

## The Plight of the Agunah: a Study in Halacha, Contract, and the First Amendment

Irving Breitowitz

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### Recommended Citation

Irving Breitowitz, *The Plight of the Agunah: a Study in Halacha, Contract, and the First Amendment*, 51 Md. L. Rev. 312 (1992)  
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# THE PLIGHT OF THE AGUNAH: A STUDY IN HALACHA, CONTRACT, AND THE FIRST AMENDMENT

IRVING BREITOWITZ\*

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## INTRODUCTION

The Orthodox and Conservative Jewish religious traditions impose strict requirements on adherents' ability to divorce. In addition to obtaining a civil divorce, the parties must conduct a religious divorce ceremony in accordance with Jewish law.<sup>1</sup> At this ceremony, the husband or his designated agent must hand to the wife or her designated agent a written document known as a *get*.<sup>2</sup> If one party refuses or is unable to participate in the religious divorce ceremony, then the other party is precluded from remarrying within the faith. For a variety of reasons, most often the victimized spouse will be the wife. A woman facing such marital disadvantage is known as an *agunah*,<sup>3</sup> and this Article deals with her difficult, and often tragic,

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1. See *infra* Subpart I.A.

2. The *get* is a written bill of divorce that a husband or his agent must physically hand over to his wife or her agent in the presence of witnesses. Unlike the *ketubah*, see *infra* note 119 and accompanying text, the entire document must be handwritten for the particular divorce for which it is being used. The language of the *get* is predominantly Aramaic, with a smattering of Hebrew. The requirement of a *get* is found in Chapter 24 of the Book of Deuteronomy:

When a man takes a wife and marries her, if it then comes to pass that she finds no favor in his eyes for he has found something unseemly in her, he shall write her a document of divorce and give it to her hand, and send her out of his house.

*Deuteronomy* 24:1 (translation by author).

3. The term "*agunah*," which appears frequently in the Talmud, see, e.g., BABYLONIAN TALMUD, see *infra* note 4, GITTIN, at 2b-3a, is derived from the term "agun" or anchor, and refers to parties who are literally "chained" to their former spouses. See *id.*

plight.<sup>4</sup> The other side's refusal to grant a *get* occasionally is moti-

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4. In order to understand the sources used in this Article, it is helpful to comprehend the basic structures of Jewish law. The supreme source of authority is the Pentateuch, the first five books of the Old Testament, which for *halachically* committed Jews, see *infra* note 17, constitutes not just a source of inspiration, but a detailed legal code covering a host of civil and criminal matters as well as those areas that are conventionally regarded as "religious." Along with this written text of the law, there was a received supplementary oral tradition interpreting the text and applying its directives to various situations. For hundreds of years, this tradition, though not inaccessible, was not committed to writing. For useful sources on the evolution of the oral law, see MEIR BERGMAN, *GATEWAY TO THE TALMUD* (1985); Z.H. CHAJES, *THE STUDENTS' GUIDE THROUGH THE TALMUD* (Jacob Schacter trans., 2d ed. 1960); HARRY SCHIMMEL, *THE ORAL LAW* (1971); ADIN STEINSALTZ, *THE ESSENTIAL TALMUD* (1976).

The earliest authoritative redaction of the oral law was the *Mishna* (Manual of Study) compiled in Palestine by Rabbi Judah the Patriarch, who died circa 219 Common Era (C.E.). The *Mishna*, however, was not a true code of law. It records many diverse opinions within the tradition and does not attempt to resolve conflicts among them. Many of its formulations were left deliberately obscure and incomplete so that the bulk of the tradition would remain oral. Moreover, many formulations in the *Mishna* were stated without accompanying reasons or policies, and were difficult to apply as precedent. Finally, the *Mishna* is occasionally self-contradictory. It was probably intended to serve as a manual or outline to judges, rabbis, and students in their attempts to organize and master a huge corpus of law and application.

An intense process of debate, dissection, analysis, and commentary on the *Mishna*, covering a span of almost 400 years, was ultimately incorporated into a work known as the *Gemara* ("teaching"), edited by a college of scholars headed by Rabbis Ashi and Ravina. The work known as the Talmud thus comprises two separate works: the *Mishna*, a product of second century Palestine, and the *Gemara*, containing the accumulated commentary and debate for four centuries on the *Mishna*. As would be expected, the *Gemara* is far more voluminous than the *Mishna*. It is not uncommon for a five-line paragraph of *Mishna* to be followed by ten or twenty pages of the *Gemara*. Technically, there are two *Gemaras*—one a product of the Babylonian academies and the other a product of the Palestinian. The Babylonian is deemed the more authoritative source and an unspecified reference to the Talmud or *Gemara* throughout this Article refers to the Babylonian version, which will be cited as *BABYLONIAN TALMUD*. The standard edition of the Babylonian Talmud is a photo offset of the 1895 Vilna-Romm edition containing the basic commentaries of Rashi (11th century France), Tosafot (11th-12th century France), and many others, along with cross-reference notes and finding aids. All page references are to the Vilna edition and its later offsets. The entire Talmud (without the commentaries) has been translated into English and published by the Soncino Press under the editorship of Isidore Epstein. See *BABYLONIAN TALMUD* (Isidore Epstein ed., 1960).

The Talmud is the authoritative and definitive source of Jewish law and practice to this day. Once again, it must be emphasized that in no sense is the Talmud a code of law. It records a bewildering diversity of opinions and except in comparatively few instances makes no attempt to provide final *halachic* decisions. As a legal work, it is far more concerned with viewing and presenting all sides of a question than it is with providing a definitive response.

Post-Talmudic *halachic* literature therefore takes on three basic forms. There is a huge body of literature whose primary focus is commentary explaining and developing the complexities of the Talmudic discussion. The premier works in this genre are the commentaries of Rabbi Shlomo Ben Yitzchak (1040-1105) of France (Rashi) and the school of the Tosaphists (the "supplementers" to Rashi's commentaries), a number of whom were members of Rashi's own family. These two commentaries are printed side-

vated by a sincere desire for reconciliation, but more often by sheer malice, spite, or an attempt to obtain valuable concessions in terms of alimony, property settlements, or child custody. In any event, it is not uncommon for abandoned wives to remain in an *agunah* status for many years.<sup>5</sup> Neither civil nor religious authorities can effect a religious dissolution—only the parties themselves can dissolve their union. As a practical matter, then, Jewish religious divorces require mutual consent and participation, and thus give rise to the possibility that parties will refuse to cooperate in order to obtain pecuniary or nonpecuniary advantages, or simply to inflict pain.

The number of women subject to this status is unclear. Some estimates have placed the number to be as high as 150,000 in the state of New York alone, while others contend that there are as few

by-side with the text of the Talmud itself. There are literally hundreds of other works of commentary of varying degrees of authoritativeness.

A second strand in the literature consists of codifications and codes, works that attempt to abstract from Talmudic commentary guidelines and principles for practical decisionmaking. Absent a formal legislative body that can enact positive law, the authoritativeness of a code depends on the erudition and prestige of its author and the cogency of its reasoning. Of the many and varied codes that have been compiled, comparatively few have achieved universal recognition; among them are *Mishna Torah*, authored by Maimonides; *Tur*, authored by Rabbi Jacob Ben Asher; and *Shulchan Aruch*, authored by Rabbi Yosef Karo.

Finally, there is the growing case law or *responsa* literature. Questions of how to apply existing principles of *halacha* were addressed to prominent rabbinic leaders and their written responses would often be collected and published in book form. Not all rabbis published their *responsa*, nor are all published works entitled to the same weight. Nevertheless, over the past thousand years, a voluminous collection of thousands of volumes from hundreds of authors has been generated, covering every conceivable aspect of Jewish law and coming from every part of the globe. This process continues to this day.

5. Obviously, a party is an *agunah* only if his or her religious principles prohibit remarriage without a religious divorce. The vast majority of Jews no longer follow Jewish religious law and, consequently, the presence or absence of a *get* is a matter of indifference to them as individuals, though it is a major concern for the Jewish community at large. Moreover, the Reform movement has officially abandoned the requirement of a *get*, though many encourage its execution to avoid complications later. See SOLOMON FREEHOF, REFORM JEWISH PRACTICE 99-110 (1944). But see *infra* note 256. Thus, the parties who are immediately affected are religiously observant and knowledgeable Orthodox or Conservative Jews. For these Jews, the lack of a *get* is a true chain and a source of anguish. As one woman, who had to wait three years for a *get*, remarked:

Your life is in limbo. You cannot begin to date, let alone think of marrying. You are at the mercy of another person who can resort to blackmail and other pressures, and your children are privy to the tension. Many women in this legal entanglement speak of feeling like hostages.

Georgia Dullea, *Orthodox Jewish Divorce: The Religious Dilemma*, N.Y. TIMES, July 5, 1982, at 40. Indeed, this author knows of one case where a woman has been unable to marry for over 20 years. For a graphic fictional description of the *agunah*'s fate, see CHAIM GRADE, THE AGUNAH (1974).

as fifty.<sup>6</sup> Whatever the number, however, each case carries its share of human misery and serves as a sad reminder of how noble religious teachings can be manipulated to serve immoral individual purposes. It also highlights the relative impotence of religious law as law in a secular society, an inevitable by-product of our federal constitution's fundamental concept of the separation of church and state embodied in the First Amendment's Establishment Clause.

This Article will describe the contours of the problem, including a description of Jewish divorce procedure, the grounds under which it can be invoked, and the consequences of failing to implement it, and will consider the possibilities of utilizing the secular judicial system as a remedy.

### I. THE NATURE OF THE PROBLEM

As far back as Biblical times, there were attempts to alleviate the plight of a spouse who would otherwise be unable to remarry.<sup>7</sup> Historically, the *agunah* problem originated not in the recalcitrance of the husband, but in his unexplained absence. Jewish law does not recognize a presumption of death arising from prolonged absence. If a husband were captured in war or his whereabouts were otherwise unknown, his wife would not be permitted to remarry until his

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6. A *New York Times* article quoted the astounding figure of 150,000. See Dullea, *supra* note 5, at 40. Nat Hentoff quoted a figure "of at least 15,000." See Nat Hentoff, *Who Will Rescue the Jewish Women Chained in Limbo?*, VILLAGE VOICE, Sept. 13, 1983, at 6. Hentoff's figure leads one to suspect that the ten-fold increase in the *New York Times* report may have been a typographical error. At the other extreme, Rabbi Mendel Epstein, a long-time activist in the area of "agunah rights," claims that at any one time, there are no more than 50 women who meet the basic definition of *agunah*. See RABBI MENDEL EPSTEIN, A WOMAN'S GUIDE TO THE GET PROCESS 2 (1989). Rabbi Epstein defines an *agunah* as a woman unable to obtain a *get* after she has exhausted all rabbinical procedures and obtained a rabbinical order directing the husband to give a *get*, which he then refuses to do. See *id.*

As noted earlier, if neither party knows or cares about a *get*, then the absence of a *get* creates no individual hardship. See *supra* note 5. The *New York Times* figure of 150,000 may well include all Jewish married couples who have divorced without a *get*, but only a tiny fraction of them perceive their status as problematical. While the Hentoff figure claims to comprise "religiously observant Jewish women who have been [civilly] divorced" without a Jewish divorce, Hentoff, *supra*, at 6, many of these women have not yet invoked the conventional channels and procedures available for obtaining a *get*, EPSTEIN, *supra*, at 2. Epstein's own number, however, ignores the heavy obstacles that women face in securing a rabbinical court order, see *infra* notes 60-69 and accompanying text, and is therefore far too low. Ultimately, whether a woman is or is not called an *agunah* is largely irrelevant. Nothing substantive turns on the nomenclature. If her marriage is in fact ended and she does not have the freedom to remarry, she has a problem worthy of consideration.

7. See BABYLONIAN TALMUD, *supra* note 4, SHABBAT, at 56a.

death could be definitely established.<sup>8</sup> The burden of proof for establishing the husband's death was originally quite high—nothing less was accepted than the eyewitness testimony of two observers who actually saw the corpse and could conclusively identify the body as that of the husband.<sup>9</sup>

According to the Talmud,<sup>10</sup> King David instituted a practice that required all soldiers assigned to combat to execute and deliver *gittin*<sup>11</sup> to their wives so that if any of them were taken prisoner or missing in action, their wives would be able to remarry. If the soldier returned safely, the parties could remarry each other. Although this procedure created the risk that one's wife might abscond with another—upon receipt of a *get*, nothing compelled her to wait for her husband's return<sup>12</sup>—such a step was justified to avoid the anguish of a wife remaining in limbo. Indeed, according to some commentaries, this *takkana*<sup>13</sup> dated from the Mosaic era.<sup>14</sup>

A second example of concern for the *agunah* dates from the Second Judean Commonwealth, where the rules requiring evidence to

8. See, e.g., BABYLONIAN TALMUD, *supra* note 4, GITTIN, at 28a-28b.

9. See BABYLONIAN TALMUD, *supra* note 4, YEBAMOTH, at 87b; BABYLONIAN TALMUD, *supra* note 4, GITTIN, at 2b.

10. See BABYLONIAN TALMUD, *supra* note 4, SHABBAT, at 56a; BABYLONIAN TALMUD, *supra* note 4, KETUBOTH, at 9b. The Talmud attempts to explain why David's marriage to Bathsheba, although clearly characterized as an immoral act, was technically not adultery, because she had been divorced from her husband Uriah before he went to war. *Id.* Had David committed adultery, he would not have been permitted to marry Bathsheba even after the death of Uriah.

The analysis in the text follows the interpretation of Rabbeinu Tam. See BABYLONIAN TALMUD, *supra* note 4, KETUBOTH, TOSAFOT, *s.v.* *Get*, at 9b. *But see* RABBI SHLOMO BEN YITZCHAK, KESUVOT, *s.v.* *Get*, at 9b [hereinafter RASHI]. Rashi, who lived in the late 11th century, is regarded as the greatest commentator in Jewish history. His commentary on the Talmud, explaining the text phrase by phrase, is indispensable to scholars of Jewish law. See also *supra* note 4.

11. "*Gittin*" is the plural of "*get*."

12. But see "Divorce of Vienna" controversy as recorded in RABBI MEIR OF LUBLIN (d. 1615), TESHUVOT MAHARAM LUBLIN nos. 102-06. A young man anticipating death from a serious illness had given his wife a divorce. He recovered and sought to remarry her. When she refused, Rabbi Meir ruled that the prior *get* was invalid, for it was given with the understanding that if the husband recovered, they would be reunited. A contrary opinion was expressed by Rabbi Shmuel Eidels (16th century Poland) and the bulk of the Polish rabbinate. *Id.*; see also J. DAVID BLEICH, CONTEMPORARY HALAKHIC PROBLEMS 152-53 (1977).

13. A *takkana* (plural: *takkanot*) is a legislative enactment by competent rabbinical authority to ameliorate the effects of an unduly harsh Biblical or Talmudic law or to enhance the social welfare. See ARNOLD COHEN, AN INTRODUCTION TO JEWISH CIVIL LAW 62 (1991).

14. See Comment of Rabbi Yaakov Ben-Asher (d. 1343) [hereinafter BAAL HATURIM] to Numbers 32:21 (comment is found in standard editions of MIKRAOT GEDOLOT, the Hebrew text of the Bible with standard rabbinic commentaries included).

establish death were considerably relaxed.<sup>15</sup> In order to alleviate the burden of proving a spouse's death, the testimony of one, rather than two witnesses, was deemed sufficient; this witness could even be someone who was normally ineligible to testify.<sup>16</sup>

This particular scenario has by no means faded from the scene. In the aftermath of the Holocaust, for example, hundreds of women had no definitive proof of their husbands' deaths, and rabbis were faced with the agonizing duty of relieving their plight while remaining faithful to the dictates of Jewish law. A number of eminent *halachic*<sup>17</sup> scholars performed this duty with great distinction.<sup>18</sup> Presently, this problem recurs with some regularity in the State of Israel and, less frequently, in the United States.<sup>19</sup>

Nevertheless, in recent years we have seen the emergence of a different sort of *agunah* case: one in which the husband is very much alive and present but uses his power to grant or withhold a *get* as a stranglehold to wring out favorable concessions from his spouse. While Talmudic precedents are thus not directly on point, they do indicate the concern that classical Jewish law had for the woman's

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15. See BABYLONIAN TALMUD, *supra* note 4, YEBAMOTH, at 87b. These rules were later codified in RABBI YOSEPH KARO (d. 1575), SHULCHAN ARUCH, EVEN HAEZER 17:3-131 [hereinafter SHULCHAN ARUCH]. The *Shulchan Aruch* ["The Prepared Table"] is regarded as the definitive code of Jewish law by Orthodox Jewry.

16. *Id.*; see also BLEICH, *supra* note 12, at 166. Examples of normally ineligible witnesses include women, minors, relatives of the decedent or wife, or persons guilty of certain religious offenses. BABYLONIAN TALMUD, *supra* note 4, YEBAMOTH, at 87b.

17. *Halacha* (Hebrew for "way of life") is the entire corpus of Jewish law. Judaism, as traditionally understood and practiced, is not exclusively a religion concerned with liturgical ritual and the like, but a complete body of substantive and procedural law that regulates every aspect of human conduct and interaction. See *supra* note 4. Side by side with prescribed rituals such as prayer and the eating of kosher food, the Talmud contains detailed rules and doctrines pertaining to torts, contracts, property rights, and personal status. By and large, even those purely "legal" rules are still religiously binding on observant Jews, though there exist few, if any, mechanisms of enforcement.

18. Examples include the late Dr. Isadore Grunfeld of the London *Bais Din*; Rabbi Yitzchok I. Weiss of Manchester and Jerusalem; Rabbi T.P. Frank of Jerusalem; and Rabbi Moshe Feinstein, for many years the "dean" of *halachic* authorities in the United States. A touching vignette of the personal anguish rabbis felt for the predicament of these "war widows" is recounted by the former Chief Rabbi of Great Britain, Lord Immanuel Jakobovitz. See Immanuel Jakobovitz, *Preserving the Oneness of the Jewish People: Can a Permanent Schism Be Averted?*, TRADITION, Winter 1989, at 91.

19. On an individual basis, rabbis often advise persons going to war or going abroad under hazardous conditions to execute a *get*, following the venerable precedent instituted by David or even Moses. See *supra* text accompanying notes 10-14. The Israeli Chief Rabbinate at one time toyed with the idea of imposing this procedure for all Israeli soldiers going to combat, but concluded that mandating even a pro forma divorce would adversely affect combat morale. See BLEICH, *supra* note 12, at 154.



plight and the willingness of the *halachic* system to take concrete steps to alleviate that concern.

To fully comprehend the nature of the problem and the difficulties in trying to solve it, three Jewish law concepts must be understood: (1) the *get* and Jewish divorce procedure, (2) the role of the *bais din*,<sup>20</sup> and (3) the rules governing divorces executed under duress.

#### A. What is a Get?

A *halachically* valid marriage may be terminated in only two ways: through death of a spouse, or by the granting of a *get*.<sup>21</sup> A civil divorce has no effect in the eyes of *halacha*, and any subsequent cohabitation or remarriage in the absence of a *get* is regarded as adulterous.<sup>22</sup> "*Get*" is an Aramaic term meaning document. The "document" refers to a brief written statement containing a legally prescribed text.<sup>23</sup> The marriage is terminated when the husband or his designated proxy hands this document to his wife or her designated proxy.<sup>24</sup> A rough translation follows:

On the \_\_\_\_ day of the week, the \_\_\_\_ day of the month of \_\_\_\_\_, in the year \_\_\_\_ from the creation of the world \_\_\_\_\_ according to the calendar reckoning we are accustomed to count here in the city \_\_\_\_\_ which is located on the river \_\_\_\_\_ I \_\_\_\_\_ the son of \_\_\_\_\_ do willingly consent being under no restraint to release, to set free, and put aside you, my wife \_\_\_\_\_ daughter of \_\_\_\_\_ who has been my wife from before. Thus I do set free, release and put thee aside in order that you may have permission and the authority over yourself to go and marry any man you may desire. No person may hinder you from this day forward and you are permitted to every

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20. Hebrew for "House of Justice," *bais din* is the term for a rabbinic tribunal, normally comprised of three rabbis. While Biblical and Talmudic law vests *batei din* (the plural form) with extensive enforcement powers, *batei din* in the United States do not possess such authority.

21. See BABYLONIAN TALMUD, *supra* note 4, KIDDUSHIN, at 2a.

22. See *infra* note 47 and accompanying text.

23. See ALEXANDER KOHUT, *ARUCH HASHALEM*, s.v. *Get*. (*Aruch Hashalem* is a dictionary of Talmudic and Midrashic literature originally compiled by Rabbi Nathan of Rome (11th century). Doctor Kohut (d. 1894) added additional etymological and philological material.) While the term *get* is occasionally employed in reference to any legal document, its predominant usage is in connection with bills of divorce. See BABYLONIAN TALMUD, *supra* note 4, TOSAFOT, at 2a; *supra* note 2.

24. See *supra* note 2.

man. This shall be for you from me a bill of dismissal, a letter of release, and a document of freedom in accordance with the laws of Moses and Israel.

\_\_\_\_\_ the son of \_\_\_\_\_ witness  
 \_\_\_\_\_ the son of \_\_\_\_\_ witness<sup>25</sup>

The execution of a *get* is a private act and it does not require the participation of, or even the consent of, a rabbinical tribunal. In view of the fact that the formalities surrounding the writing and transfer of a *get* are numerous and complex, however, a rabbinical court of at least three is invariably present. Even so, the rabbi's role is supervisory only. In the eyes of *halacha*, it is the husband who divorces his wife, in contradistinction to the customary civil law view that the state or the judiciary dissolves the marriage. Under Biblical and Talmudic law, any coercion directed toward a husband in the giving of a *get* rendered the divorce a nullity, while a wife could be forced to receive a *get*.<sup>26</sup>

The basic ceremony is fairly simple and can normally be accomplished in under an hour. The husband and wife meet at a prearranged time and place with three rabbis present. One rabbi, known as the *Mesadar HaGet* ("arranger of the *get*"), will be primarily responsible for ensuring observance of the requisite religious formalities and the other two will serve as witnesses. Also present will be a scribe, who will compose the text of the *get* by hand.<sup>27</sup> Because the writing of the *get* devolves upon the husband, the husband must formally designate the scribe as his agent before the scribe can begin the composition of the *get*. The *get* must contain proper dates based on the traditional Jewish calculation, location, and names of the husband and wife, including common nicknames, followed by the traditional designation of the parties as "son of" or "daughter of." Last names are not used, and all names must be spelled correctly. Indeed, one of the most difficult, albeit tedious, jobs of the *Mesadar HaGet* is to determine which names should be included<sup>28</sup> and how to transliterate those names into Hebrew. Upon completion of the writing of the *get*, two witnesses sign at the bottom. The husband

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25. See RABBI ASHER BEN YECHIEL, PISKAI ROSH, end of GITTIN (translation by author).

26. See *infra* notes 41, 72-76 and accompanying text.

27. The *get*, although only a twelve line standardized text, may not be printed, xeroxed, or even prewritten with spaces left blank for names and places. See SHULCHAN ARUCH, *supra* note 15, EVEN HAEZER 131:1.

28. One can imagine the confusion if Robert is sometimes called Rob, Bob, Robby, Bobby, or Skip, and also has a Jewish name of Rafael that he never uses; the same questions may be raised regarding his father, his wife, and her father.

and wife are both asked a set of formalized questions as a final assurance that the *get* is not a product of duress, compulsion, extortion, or the like. The husband then takes the document, physically deposits it in his wife's hands, again in the presence of witnesses, and upon the *get*'s delivery, the marriage is officially terminated.<sup>29</sup> If either husband or wife cannot be present, the entire procedure may be carried out by designated proxy and the *Mesadar* must ensure that all powers of attorney are in proper form.

After receiving a *get*, a divorced woman is free to marry anyone she chooses including her former spouse, except for the following persons: (a) a *Cohen*—descendant of the priestly class, (b) a man with whom she committed adultery, (c) persons who served as witnesses for the *get*, (d) her former husband if in the interim she marries someone else who then dies or divorces her, or (e) her former husband if she was guilty of adultery during the course of a marriage.<sup>30</sup> In addition, she must wait ninety days from the delivery of the *get* to determine whether or not she is pregnant from her first husband.<sup>31</sup>

Interestingly, just as a civil divorce has no validity in the eyes of religious law, a religious divorce is not civilly recognized. Unlike marriage, where virtually all states recognize that a ceremony performed by an authorized minister of the faith is accorded validity, the power of dissolution still rests exclusively with the secular judiciary.<sup>32</sup> Thus, the *get* is totally unrelated to either the granting or withholding of civil dissolution. As a matter of practice, however, many rabbinical tribunals will not supervise the execution of a *get* until all attempts at reconciliation have failed. This may often mean delaying the *get* until a judgment of dissolution has been entered.<sup>33</sup>

29. As a procedural matter, divorced women generally do not keep the *get*, but return it to the custody of the *bais din*, which will issue an official receipt stating that the *get* was properly delivered. If further evidence of her divorced status ever becomes necessary, the *bais din* will produce the original from its archives.

30. See *Leviticus* 21:7 (prohibiting a divorcee from marrying a *Cohen* (descendent of the priestly class)); *Deuteronomy* 24:1-4 (prohibiting remarrying one's own spouse once she has married); SHULCHAN ARUCH, *supra* note 15, EVEN HAEZER 11:1 (a woman guilty of adultery may not remain with her husband).

31. See BABYLONIAN TALMUD, *supra* note 4, YEBAMOTH, at 41a; SHULCHAN ARUCH, *supra* note 15, EVEN HAEZER 13:1. The delivery of a *get* also triggers alimony, child support, and custody rights, but these are beyond the purview of this Article. See Diane Engel, *Marital Property Rights in Jewish Law: A Survey and Comparison*, NAT'L JEWISH L. REV. 97 (1987).

32. This, however, was not always the case. Civil divorce is a comparatively late development.

33. This is the official practice of the Chief Rabbinate of Great Britain, which has taken the position that such deferral is required by secular law. See Susan Maidment, *The*

*B. The Right to Initiate the Jewish Divorce Process*

The *Mishna*<sup>34</sup> in the tractate *Gittin* discusses the grounds upon which divorce should be pursued and records three opinions.<sup>35</sup> The House of *Shammai* maintains that one should not divorce one's spouse unless she is guilty of adultery.<sup>36</sup> The House of *Hillel* permits divorce even on the basis of trivial dissatisfactions such as burning the soup.<sup>37</sup> Finally, Rabbi Akiva asserts that a husband has the right to divorce his wife even in the absence of any basis for dissatisfaction—for example, he is simply attracted to someone else.<sup>38</sup> It is clear from a number of statements in the Talmud that these opinions do not pertain to the legal validity of a *get*, but merely to the moral advisability of instituting the procedure.<sup>39</sup> In fact, a husband has an absolute right, or at least power,<sup>40</sup> to divorce his wife at will for no reason at all and without her consent.<sup>41</sup>

The absolute right of a husband to institute divorce proceedings, recognized by Biblical and Talmudic law, underwent a drastic change in the tenth century.<sup>42</sup> Rabbeinu Gershom,<sup>43</sup> acknowledged

*Legal Effect of Religious Divorces*, 37 MOD. L. REV. 611, 620 & n.44 (1974). Rabbis in the United States do not have a standard practice.

34. See *supra* note 4.

35. BABYLONIAN TALMUD, *supra* note 4, GITTIN, at 90a.

36. See *id.*

37. See *id.*

38. See *id.*

39. See, e.g., *id.* The *Shulchan Aruch*, however, does note that it is morally improper to divorce one's first wife for any grounds short of actual or suspected adultery or extreme nastiness of disposition. See SHULCHAN ARUCH, *supra* note 15, EVEN HAEZER 119:34.

40. To use the terminology of Wesley Hohfeld, a person has a "right" to perform a certain act only if others have a "duty" to let him perform it. Because Jewish law may prohibit divorce for less than weighty reasons that a *bais din* is duty-bound to discourage, the husband does not have a "right" of unqualified divorce in Hohfeldian terms. "Power," on the other hand, refers to a capacity of creating, divesting, or altering rights and does not necessarily imply a duty on others of noninterference. In that sense, the *ex post facto* validity of a *get* executed for any reason at all is indicative of a "power" rather than a "right." See generally WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 64-114 (1964). Hohfeld's unique terminology has been quite influential in modern jurisprudential thought, though his scheme is both incomplete and difficult to master. See, e.g., ROSCOE POUND, 4 JURISPRUDENCE 77-106 (1959) (listing bibliography of writings on the subject).

41. See BABYLONIAN TALMUD, *supra* note 4, YEBAMOTH, at 112b (codified in SHULCHAN ARUCH, *supra* note 15, EVEN HAEZER 119:6) ("A wife may be divorced either willingly or unwillingly but a husband may be divorced only from his free will.").

42. Despite the availability of "no fault" divorce, at least on the part of the husband, the Talmud is replete with references concerning the tragedy of divorce. See, e.g., BABYLONIAN TALMUD, *supra* note 4, GITTIN, at 80b ("When one divorces his wife, even the altar in heaven sheds tears."). The rabbinic court is enjoined to attempt to bring the

leader of East European Jewry, spearheaded the enactment of a decree that prohibited a husband from divorcing his wife against her will except in narrowly defined circumstances. He also instituted a decree banning the Biblically permitted—though discouraged—practice of polygamy.<sup>44</sup> This legislation essentially introduced a spirit of equality in divorce proceedings, and for the most part necessitates that all divorce occur through *mutual* consent.<sup>45</sup> As one authority noted:

When [Rabbeinu Gershom] saw how the generation was abusive of Jewish daughters insofar as divorcing them under compulsion, he enacted that the rights of women be equal to those of men, and just as a man divorces only from his own will, so too a woman might henceforth be divorced only willingly.<sup>46</sup>

Although subsequent to the enactment of the decree husbands and wives seem to be on the same footing, this is not entirely true. In the first place, the consequences of adultery on the part of a married woman are considerably more severe than they are for a married man. If a married woman—including any woman *halachically* married, whose marriage has not been terminated by a *get*—cohabits with a man other than her husband, whether the man is married or not, she and her paramour are guilty of a capital offense.<sup>47</sup> Any chil-

parties to an amicable reconciliation. Indeed, even after the divorce, the parties may be encouraged to remarry (unless the husband is a Cohen).

43. Rabbeinu Gershom ("Our Master" Gershom), known by his contemporaries as *Me'or HaGolah* ("The Light of the Diaspora") lived in Mayence (Mainz) in the latter part of the 10th century. Historians have debated whether he in fact promulgated the *takkanot* that have been attributed to him. See 7 ENCYCLOPEDIA JUDAICA, *Gershom Ben Yehuda*, at 511-12 (1971); ARYEH GROSSMAN, *THE EARLY SAGES OF ASHKENAZ* 1451 nn.135-37 (1981).

44. See BLEICH, *supra* note 12, at 146-47. The ban on polygamy is codified in SHULCHAN ARUCH, *supra* note 15, EVEN HAEZER 1:10. Interestingly enough, the Sefardic communities of North Africa, Palestine, and Spain (Moslem countries) never accepted Rabbeinu Gershom's *takkanot* and continued the practice of polygamy until very recent times. *Id.* I believe, however, that even these communities did not permit the divorcing of a woman without her consent. The *Bait Yosef*, in his comments to *Tur Even Haezer*, informs us that Rabbeinu Gershom intended his ban to be in effect only until the end of the Fifth Millennium (1240 C.E.), and continued adherence to the ban is no longer a matter of strict law, but simply long-standing community custom. Others maintain that the Ashkenazic communities through their religious leadership renewed the ban before its expiration date without stipulating a time period for its enforcement. See generally Gedaliah Schwartz, *Heter Meah Rabbanim*, 11 J. OF HALACHA & CONTEMP. SOC'Y 33, 37-38 (1986).

45. See BLEICH, *supra* note 12, at 146-47.

46. RABBI ASHER BEN YECHIEL (d. 1480), TESHUVOT ROSH 42:1.

47. See Deuteronomy 23:22. This fact has only theoretical importance today. Under

dren resulting from such a union face the stigma of *mamzer*.<sup>48</sup> If the relationship was consensual the woman forfeits her alimony rights and is not permitted to remain married to her husband even if he is willing to forgive the offense.<sup>49</sup> Moreover, subsequent to a divorce from her husband, she is not permitted to marry her paramour.<sup>50</sup> On the other hand, if a married man commits adultery with an unmarried woman, under Biblical law no crime has been committed.<sup>51</sup> Any resulting children are not tainted with the stigma of illegitimacy; the husband is permitted to remain with his wife if she consents and even perhaps if she does not. Further, in the event of

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Biblical law, Jewish courts had the authority to impose capital punishment for a variety of offenses including blasphemy, murder, adultery, and desecration of the Sabbath. See GEORGE HOROWITZ, *THE SPIRIT OF JEWISH LAW* 159-60 (1973). Rape of an unmarried woman was not a capital crime. See *Deuteronomy* 23:28-29. Even when the laws of capital punishment were in effect, however, the procedural and evidentiary requirements for the imposition of a capital sentence were so difficult to satisfy that the *Mishna* in the tractate *Makkot* remarked that any court that executed one individual in seventy years was considered unusually violent. See BABYLONIAN TALMUD, *supra* note 4, *MAKKOT*, at 7a. The power to impose capital punishment lapsed with the Roman conquest of Judea in 30-40 C.E., and at least with respect to Biblical offenses, has not been reinstituted in the State of Israel. HOROWITZ, *supra*, at 215-16. As a matter of religion and conscience, however, "capital offenses" are deemed more serious transgressions than noncapital sins. See RABBI MOSES BEN MAIMON (MAIMONIDES) (d. 1204), *MISHNA TORAH* [RESTATEMENT OF THE LAW], *HILCHOT TESHUVA* [LAWS OF REPENTANCE] 1:4 [hereinafter *RAMBAM*, *MISHNA TORAH*]. (The *Mishna Torah* is a monumental redaction of the entire corpus of Jewish law in a unique organizational scheme. The terse and undocumented formulation of Maimonides, as well as the many disagreements with his contemporaries, spawned a huge literature of annotation and commentary that is still growing today. See *supra* note 4.)

48. The term *mamzer* is normally translated as "illegitimate," but has a specialized, technical meaning that is not captured in that translation. In the first place, a child born out of wedlock is not a *mamzer* and is under no disability at all. A *mamzer* is a child conceived in an incestuous relationship or an adulterous union between a married woman and any man not her husband. Second, a *mamzer*'s disabilities, while quite severe, are also limited to one particular sphere—restrictions on the choice of marriage partners. A *mamzer* may not marry another Jew unless that person is also a *mamzer* or a convert. In all other respects, however, such as inheritance rights and eligibility for community positions of authority, *halacha* does not permit discrimination. Indeed, the Talmud states that a "mamzer who is a scholar of the Law is entitled to more respect than a High Priest who is an ignoramus." BABYLONIAN TALMUD, *supra* note 4, *HORIYOT*, at 13a.

49. See SHULCHAN ARUCH, *supra* note 15, *EVEN HAEZER* 115:5 (forfeiture of *ketubah*); *id.* at 178:16 (prohibiting continuance of the marriage).

50. See *id.* at 11:1; ARUCH HASHULCHAN, *EVEN HAEZER* 178:30.

51. That "no crime has been committed" means only that the act is not adulterous. A married man cohabitating with an unmarried woman is, under strict Biblical law, no different than an unmarried man cohabitating with an unmarried woman. The marital status of the male is simply irrelevant. Nevertheless, although the male's marital status does not make the union adulterous, nor does it taint the offspring with the stigma of *mamzeirus*, it is prohibited to the same degree as any out-of-wedlock relationship.

marital breakup, he may marry his lover.<sup>52</sup>

Although Rabbeinu Gershom's decree normally precludes both polygamy and divorce without the wife's consent, the impact of this decree may be avoided. While a married woman can in no instance be permitted to remarry without a *get* (because to do so involves a Biblical infraction not subject to Rabbinical annulment or dispensation), the Rabbinical ban of Rabbeinu Gershom may be annulled pursuant to a procedure described as a *Heter Me'ah Rabbanim* ("Dispensation of 100 Rabbis"). The first mention of this extraordinary procedure appears in the *Kol Bo*,<sup>53</sup> which states:

The excommunication ban which Rabbeinu Gershom decreed is not to be lifted except with the approval of one hundred sages from three communities and from three countries such as Aragon, Lombardy, and France. They should not agree to remove it until and unless they see an unquestionable and clearcut reason for such leniency, and also that the particular case be clearly defined.<sup>54</sup>

Sometimes, the effect of the annulment is to lift the ban on polygamy, thereby permitting the husband to marry again while remaining married to the first spouse. At other times the *heter* permits the institution of an involuntary divorce.<sup>55</sup> It should be noted, however, that as a practical matter, many Rabbinical authorities were extremely reluctant to participate in this annulment procedure.<sup>56</sup>

The essence of Rabbeinu Gershom's ruling is that now, neither party normally can execute the *get* process without the consent of the other. In theory, therefore, each party may be held hostage to the other's recalcitrance. Nevertheless, because the negative conse-

52. *But see* REMA, comment to SHULCHAN ARUCH, *supra* note 15, EVEN HAEZER 154:1 (stating that if the husband is a "frequenter of prostitutes" and the wife demands a divorce, "some are of the opinion that the husband may be forced to grant a *get*"); RABBI TZVI ASHKENAZY, TESHUVOT CHACHAM TZVI, no. 133 (limiting the ruling of Rema to the habitual offender, not the one-time adulterer who has repented of his sin). The unfaithful wife is not given the luxury of repentance.

53. The *Kol Bo* is a *halachic* work by an unknown author, and is thought to be of Spanish origin (circa 13th century).

54. KOL BO, Ch. 116; OTZAR HAPOSKIM, EVEN HAEZER 1:10. The grounds for which such dispensation may be granted are many: (1) where the husband is unable to have children with his present wife, (2) where the first marriage is prohibited by Jewish law, (3) where the present wife refuses to cohabit with her husband, (4) where a wife unjustifiably abandons her home, or (5) where the present wife suffers a mental disability that renders her unable to accept a *get*.

55. For an extensive discussion, see OTZAR HAPOSKIM, *supra* note 54, EVEN HAEZER 1:68; Schwartz, *supra* note 44, at 41-49.

56. *See* RABBI SHLOMO KLUGER (d. 1868), HAELEF L'CHA SHLOMO, EVEN HAEZER 7; Schwartz, *supra* note 44, at 46.

quences of a refusal of the other party to consent to a *get* are both more severe and less avoidable for the wife than for the husband, the *agunah* issue is perceived correctly as predominantly, though by no means exclusively, a woman's tragedy.

### C. *The Role of the Bais Din*

1. *General Function.*—"Bais din"<sup>57</sup> is the term for a rabbinical tribunal commonly comprised of three rabbis, or one rabbi and two lay persons, assembled to decide matters of Jewish law or resolve disputes. Under classical Biblical and Talmudic law, each community had its own *bais din* that would be empowered to rule on matters of Jewish law and to compel obedience to its rulings.<sup>58</sup> Indeed, even after the destruction of the Judean state, for hundreds of years Jews were able to maintain the rule of Jewish law and to preserve the functioning of their courts. As one commentator noted, "Among all the institutions of self-government in the Middle Ages, the Jewish court was by far the most distinctive and characteristic."<sup>59</sup>

The aftermath of the French Revolution, however, led to a fragmentation of communal cohesiveness, the withdrawal of legal recognition of religious communities as politically autonomous entities, and the development of the separation of church and state. These developments created a situation where *batei din* no longer had coercive power and could decide only those disputes that the parties voluntarily submitted to them. As a matter of religious law, it is still true today that civil disputes among Jews must be submitted to a *bais din* rather than a secular tribunal.<sup>60</sup> If an individual refuses to respond to the summons of a *bais din* or initiates action in a secular tribunal, the court may issue a *k'sav siruv*—a citation declaring him to be in contempt.<sup>61</sup> Nevertheless, the *k'sav siruv* itself carries with it no legal sanction; at best it may result in a certain degree of community pressure, but more often it does not.<sup>62</sup> Moreover, as a practical

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57. See *supra* note 20. The information in this Subpart is a product of the author's own experience sitting on a *bais din*. For a more detailed discussion, see Harvey Kirsh, *Conflict Resolution and the Legal Culture: A Study of the Rabbinical Court*, 9 OSGOOD HALL L.J. 335 (1971). See also Dov Frimer, *The Role of the Lawyer in Jewish Law*, 1 J.L. & RELIGION 297 (1982).

58. See generally AARON SCHREIBER, *JEWISH LAW AND DECISION-MAKING: A STUDY THROUGH TIME* 236-80 (1979).

59. Comment, *Jewish Divorce and the Civil Law*, 12 DEPAUL L. REV. 295, 300 n.24 (1962).

60. See SHULCHAN ARUCH, *supra* note 15, HOSHEN MISHPAT 26:1; EMANUEL QUINT, 1 A RESTATEMENT OF JEWISH CIVIL LAW 176-81 (1990).

61. SHULCHAN ARUCH, *supra* note 15, HOSHEN MISHPAT 11:1.

62. *Id.*; *id.*, YORE DE'AH 334:11-12 (refusal to obey the decision of a *bais din* may result



matter, many *batei din* are extremely reluctant to issue a *k'sav siruv* and, as a result, even the small amount of pressure that could be applied to the recalcitrant party through this process often fails to materialize. Thus, in the absence of an arbitration agreement, it is extremely difficult to compel an unwilling party to take a dispute of any nature to a *bais din*. If neither party is willing, it becomes impossible.

Another point to consider is that most communities today do not have a standing *bais din*. There is, for example, no officially designated *bais din* in Baltimore whose rulings are accepted by all segments of Baltimore Jewry. Indeed, there is not even an officially designated Orthodox or Conservative *bais din* on either the local or national level whose rulings would be even morally binding on adherents of their respective movements.

In the absence of a standing *bais din*, which is normally regarded as the preferable alternative, the *Shulchan Aruch* rules that each party may pick one judge of his or her choice and the two chosen judges select a third judge.<sup>63</sup> The vast majority of disputes submitted to a *bais din* are decided under this procedure, commonly referred to as ZABLA, an acronym for "*Ze Boreir Lo Achad*" ("each chooses one"). While the paucity of rabbinical judges in the community may make ZABLA a necessity, the procedure raises a host of problems.

Giving the defendant the right to choose a judge creates opportunities for indefinite delays and makes it virtually impossible ever to hold a defendant in contempt; until he makes his choice, there is no *bais din* that can issue a *k'sav siruv*. Moreover, many parties have a common misconception that in a ZABLA each of the two judges is supposed to function as an advocate for the side that chose him. This is patently untrue. All three judges are supposed to be unbiased, disinterested adjudicators.<sup>64</sup> Nevertheless, as a consequence of this misconception, litigants may have a fundamental disrespect for the process—even more so in light of the fact that the *bais din* also can contain laypersons who are not experts on matters of Jew-

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in the imposition of a ban or excommunication). In a religiously observant society, the imposition of a ban may be potent. In a largely non-*halachic* society, however, a recalcitrant defendant will simply ignore the ban just as he ignored the *bais din*, and his friends and colleagues may follow suit.

63. SHULCHAN ARUCH, *supra* note 15, HOSHEN MISHPAT 13:1-2.

64. See RABBI ASHER BEN YECHIEL [ROSH], SANHEDRIN 3:2. But see RABBI YECHIEL M. EPSTEIN, ARUCH HASHULCHAN [SETTING OF THE TABLE], HOSHEN MISHPAT 13:1-2. The *Aruch Hashulchan* was an early 20th century attempt to restate Jewish law in contemporary terms and to show the historical development of the law from the Talmud through the present day. Its chapter headings are the same as the *Shulchan Aruch*.

ish law. Believing that the process is tainted, they refuse to utilize it, and often disregard its orders. Furthermore, it cannot be denied that in more than a few cases, litigants' contentions that the ZABLA judges are not neutral or are not learned have been borne out. This too explains why *k'sav siruv* is so infrequently issued, and, when issued, so widely ignored. Even litigants acting in bad faith escape the wrath of their communities by alleging bias of one of the ZABLA judges, an accusation typically hard to disprove.

Finally, regardless of the neutrality or competence of the *bais din* in an individual case, the fact that each *bais din* is an ad hoc group means there is no institutional continuity, no sense of precedent, and few or no standardized procedures regarding standards of evidence, use of documentation, participation of attorneys, and the like. Different *batei din* simply do things differently, sometimes based on *halachic* considerations, sometimes based on the curbstone equities of the case, and sometimes based on common sense. Under a ZABLA system, therefore, there is no real way litigants can know the rules of the game in advance. As a result, attorneys often counsel their clients to stay away from a *bais din*.

Many of these problems could be eliminated if community-wide standing *batei din* were established.<sup>65</sup> Such institutions would enjoy community acceptance, and their orders would more likely be respected. Unwilling litigants would in turn feel greater pressure to comply. Because the members of the *bais din* would not be chosen or compensated by the parties, but instead funded by the community, bias or the appearance of bias would be minimized. Also, greater expertise in *halachic* rules governing dispute resolution would be fostered. Most important, a community-wide *bais din* could establish uniform standards of practice and procedure to dispel the appearance of instability, inconsistency, and arbitrariness. These standards could be published and circulated among all segments of the Jewish community so that the *bais din* would once again be regarded as a viable alternative to civil remedies.<sup>66</sup>

Assuming both parties do eventually come before a *bais din* of

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65. A number of communities do have standing *batei din*, as do a number of national organizations. Examples are the various Chassidic groups (*Lubavitch*, *Satmar*, *Belz*) and organizations like the Rabbinical Council of America. While these are highly respected and do supply the vital element of procedural regularity, they still fall short of constituting a central authority for a discrete geographical area. As such, their decisions are often flouted, and they in turn are reluctant to issue a *k'sav siruv* on the theory that to do so would be a useless act.

66. See Irving Breitowitz, Book Review, 51 *Jewish Action* 78 (1991) (reviewing QUINT, *supra* note 60).

either the standing or the ZABLA type, the general procedure is relatively simple and informal. The use of attorneys is generally discouraged—the litigants and witnesses are questioned directly by the judges. All evidence, including hearsay, is admissible, although its weight may be appropriately discounted. Before deciding the case, the *bais din* will normally ask the parties to sign the equivalent of a binding arbitration agreement to ensure that the ultimate decision of the *bais din* will be civilly enforceable. Thus, while it is extremely difficult to bring a party before a *bais din*, it is far easier to enforce its decision once made—at least no more difficult than enforcing an arbitration award in general.

2. *The Bais Din in Divorce Cases.*—In the area of divorce, a *bais din* may be involved at two different points. First, if both parties have agreed to a divorce, the actual execution and delivery of the *get* will be supervised by a *bais din*. Here, in universal acknowledgement that the laws of writing a *get* are extremely complex, ZABLA invariably is not used. Rather, communities tend to have individual rabbis who are experts in this area. These rabbis handle all *gittin* in the community and choose two other people to assist them in their task.

A *bais din* also may be necessary to resolve a contested proceeding. Here again, ZABLA raises the potential for serious abuse. Assuming that a wife wants a *get* and the husband refuses to give it to her, her only recourse is to go to a *bais din*; a secular court cannot order a religious divorce (at least in the absence of a contract). The *bais din* will determine whether grounds exist that would *halachically* justify an order directing the husband to give a *get*.<sup>67</sup> The *bais din* would inquire into details concerning physical, mental, or emotional abuse; support obligations; and all relevant aspects of marital and family life. Medical and psychiatric testimony would be admissible to aid the *bais din* in its determination, and for the most part, the *bais din* would attempt to be fair and neutral.

For the reasons described above, however, it is fairly easy for the husband to evade coming before a *bais din*. If the wife obtains a summons from a standing *bais din*, the husband may invoke ZABLA as a delaying mechanism and then not designate his judge. Even if both parties agree on a *bais din*, the husband may fail to appear, or if he appears and the *bais din* orders him to give a *get*, he may simply fail to comply. It should be emphasized that there is a fundamental distinction between the procedures of a *bais din* in monetary matters

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67. See *infra* note 80.

and in *gittin*. As noted, in monetary matters the parties sign an arbitration agreement so that the decision of the *bais din* may be civilly enforced through the courts. This device cannot readily be employed in *get* cases. As a general proposition, *gittin* issued pursuant to the order of a civil court and under threat of fine or incarceration for civil contempt are invalid.<sup>68</sup> There are a wide variety of circumstances where the *bais din* might advise or even order the husband to execute the *get* but, as a matter of Jewish law, could not allow the courts to enforce their order.<sup>69</sup>

Thus, women are faced not only with the normal difficulties of getting an adversary to respond to a summons and appear before the *bais din*, but also with the additional problem of not being able to civilly enforce the *bais din*'s order, even where the husband has appeared.

At that point, an *agunah*'s only recourse is to capitulate to whatever demands her husband might make concerning alimony, child support, custody, or the like,<sup>70</sup> or to mobilize community support in calling for sanctions such as boycotts, posting the husband's picture in public places, having her husband branded as a disobeyer of the *bais din*, or depriving him of synagogue honors. Although there have been many calls for greater rabbinic and community activism in this area,<sup>71</sup> women historically have had to organize this pressure by themselves.

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68. See *infra* notes 72-79 and accompanying text.

69. See *infra* notes 80-81 and accompanying text.

70. Withholding a *get* is commonly done as a device to secure concessions in property rights or custody. A recent case in New York may change the picture somewhat, though its effect is uncertain. See *Perl v. Perl*, 512 N.Y.S.2d 372 (N.Y. App. Div. 1987); *infra* note 388.

71. In recent years, women themselves have organized support groups to exert pressure on unwilling husbands. One organization known as GET (Getting Equitable Treatment) uses volunteer "caseworkers." "We will do whatever we can without force—we do not use brute strength—to convince the recalcitrant spouse." Dullea, *supra* note 5, at 40 (quoting Gloria Greenman, President of GET).

Occasionally, this pressure takes a more drastic form. See Blu Greenberg, *Jewish Attitudes Towards Divorce*, in *JEWISH DIRECTORY & ALMANAC* 106, 111 (Ivan Tillem ed. 1984). A group of women in a Canadian city announced that none of them would cohabit with their husbands until a friend of theirs received a free *get* from an ex-husband who was holding out for \$25,000. She received her *get* in short order. *JEWISH PRESS*, Oct. 26, 1979 (Magazine), at M41. Occasionally, mass demonstrations, or picketings, either against the recalcitrant spouse or what is perceived as an overly passive Rabbinical leadership, are organized with moderate success. Interview with David Farber, a self-styled "*agunah* organizer," at Union of Orthodox Jewish Congregations National Convention, Washington, D.C. (Nov. 23, 1990). (The author appeared on a panel with Mr. Farber.)

D. Get Meusah: *A Bill of Divorce Granted  
Under Compulsion or Duress*

A final introductory concept that needs to be explained is that of *get meusah*—the invalidity of a bill of divorce executed under duress or compulsion. In any attempt to deal with the unwilling, recalcitrant spouse, this is a formidable obstacle that must be surmounted. Whether and how the problem of *meusah* can be circumvented is central to any analysis of prenuptial agreements or other possibilities of civil enforcement.

A *get* is effective only if it is executed and delivered with the husband's consent.<sup>72</sup> As a corollary, a *get* that the husband ostensibly authorized, but as a consequence of duress, is invalid because it was not a product of the unfettered exercise of his will.<sup>73</sup> One particular issue pertaining to *gittin* issued under duress involves the impact of contractually assumed, self-imposed penalties. Assume, for example, a husband agrees to divorce his wife and stipulates payment of a penalty in the event the divorce is not delivered by a certain date. The husband then later declares his unwillingness to execute the *get*, but does so in order to avoid payment of the penalty. On one level, such a *get* is a product of duress because the decision to give the *get* was motivated by the desire to avoid the imposition of a penalty. On the other hand, because the creation of the penalty was entirely consensual, the *get* is arguably valid.<sup>74</sup> The authorities are divided over this issue,<sup>75</sup> and, at least as an ini-

72. See, e.g., BABYLONIAN TALMUD, *supra* note 4, YEBAMOTH, at 112b; RAMBAM, MISHNA TORAH, *supra* note 47, ISHUT.

73. BABYLONIAN TALMUD, *supra* note 4, GITTIN, at 88b. The notion that transactions entered into under duress are voidable is a familiar one to students of Anglo-American law, but has not yet been entirely incorporated into *halacha*, which in general validates conveyances made under duress unless they are gratuitous. See SHULCHAN ARUCH, *supra* note 15, HOSHEN MISHPAT 205:1. This suggests that classical *halacha* was more concerned with the fairness of the resulting exchange than the underlying defects in the bargaining process. See generally 2 ISAAC HERZOG, MAIN INSTITUTIONS OF JEWISH LAW 130-31 (1977). The fact that duress is recognized as a basis for the invalidation of a *get*—such a *get* is void, not merely voidable—underscores the crucial importance of consent and the problematic nature of judicial coercion.

74. Under common-law principles, a "threat" to enforce a contractual right against a debtor unless the debtor consents to some additional obligation or undertaking would not be grounds for avoiding the resulting commitment; to the extent any "threat" was made, its exercise will be entirely lawful. See RESTATEMENT (SECOND) OF CONTRACTS § 176, cmt. d (1981).

75. Rabbi Shlomo Ben Aderet (Rashba) (13th century Spain) took the position that such a *get* was invalid even *ex post facto*. 4 RASHBA, TESHUVOT HARASHBA no. 40. Rashba was the acknowledged preeminent *halachic* authority of his generation. See also RABBI MENACHEM MEIRI, BEIT HABECHIRA 88b (Commentary to *Gittin*, 13th century France). A contrary position is espoused in 2 RABBI SHIMON BEN TZEMACH, TASHBATZ

tial matter, in order to avoid *get meusah*, no *get* should be issued unless and until there is a prior unconditional forgiveness of indebtedness.<sup>76</sup>

Jewish law recognizes a variety of situations where a husband may be compelled to divorce his wife.<sup>77</sup> Although the notion of a compelled *get* is contrary to the axiom that the *get* must be given without duress of any kind, the Talmud responds laconically that the person is forced until he declares, "I am willing."<sup>78</sup> There must indeed be a formal expression of consent, but that formal expression may be induced through virtually any form of psychological, financial, or even physical pressure including incarceration and threat of bodily injury, or even threat of death.<sup>79</sup>

The acceptability of this type of formalistic, attenuated consent is limited both procedurally and substantively. Procedurally, it is triggered only if a duly constituted *bais din* has issued a final judgment directing the husband to give a *get*, so that as a technical matter coercion is directed to compliance with the mandate of the court rather than the execution of the *get* per se. Substantively, such an order must be predicated on the specific grounds enumerated in *ha-*

no. 68 (one who gives a *get* in order to avoid a penalty that came of his own accord is acting willfully). An intermediate position is adopted by a number of authorities who would distinguish between voluntarily assumed penalty clauses, where the promisor retains the freedom to refuse to deliver the *get* and incur a penalty, and cases of solemn oaths, which destroy freedom of choice because they are specifically enforceable. See, e.g., TUR, EVEN HAEZER, ch. 154 (Standard ed. at 76b) (citing Rabbeinu Peretz); RABBI YOSEF KARO, BAIT YOSEF, Comments (comments to TUR, EVEN HAEZER 134 (Standard ed. at 26b)) (citing Rabbi Maimon Nager); see also *id.* (noting that even in the case of a *get* issued pursuant to an oath, the *get* is valid ex post facto, although it should not be delivered until the oath is *halachically* annulled). *Arba Turim* [The Four Rows], commonly known as *Tur*, was authored by Rabbi Jacob Ben Asher (13th-14th century Spain). Unlike Maimonides' approach, *Tur* traces its conclusions back to the Talmudic sources and provides a digest of virtually all opinions of Jewish law. *Tur* is comprised of four books. The book of *Even Haezer* addresses laws concerning marriage, divorce, and personal status.

76. The final and generally accepted compromise ruling is recorded by Rabbi Moshe Isserles (Rema) (16th century Poland) in SHULCHAN ARUCH, *supra* note 15, EVEN HAEZER 134:5. Rema's commentary on the *Shulchan Aruch*, although ostensibly an independent work, is incorporated as an inseparable part of the *Shulchan Aruch*.

77. See *infra* note 80.

78. BABYLONIAN TALMUD, *supra* note 4, YEBAMOTH, at 106a.

79. The classic justification for this attenuated consent is stated in RAMBAM, MISHNA TORAH, *supra* note 47, HILCHOT GERUSHIN 2:20. Maimonides states that it is assumed that every Jew truly desires to comply with religious law and any refusal to do so is merely the result of an "evil disposition" that temporarily overpowers or vanquishes his free will. Duress is therefore applied not to overcome the husband's exercise of will but to remove the impediment that prevents that true will from emerging.

*lacha* as requiring the granting of a *get*.<sup>80</sup> The findings of fact of a

80. The Talmud enumerates a number of specified grounds that enable a woman to petition for divorce, and later authorities have supplemented the list:

1. If her husband becomes afflicted with certain loathsome diseases after marriage or even if the disease predated the marriage but, as of the date of the marriage, its existence was unknown to her.
2. Impotence or sterility.
3. Failure to provide material support.
4. Refusal to cohabit.
5. Physical or verbal abuse.
6. Husband forces wife to violate religious law.
7. Husband is engaged in certain occupations that are physically repulsive—dung gathering, tanning hides.
8. Husband becomes an apostate.
9. Habitual infidelity.

BABYLONIAN TALMUD, *supra* note 4, KETUBOTH, at 77a; SHULCHAN ARUCH, *supra* note 15, EVEN HAEZER 154. With respect to some of these grounds, the woman's right to a divorce carries with it the entitlement to the alimony settlement stipulated in the *ketubah*. With respect to others, she gains her freedom only at the cost of forfeiting those rights. See BEN ZION SHARESHEVSKY, DINAI MISHPACHA 285-300 (1967).

Many authorities maintain that the coercive power of a *bais din* is virtually unlimited and includes the imposition of monetary fines, imprisonment, corporal punishment, a ban of excommunication, and even threat of death. See RABBI YITZCHACK ALFASI, RIF, KETUBOTH, ch. 7. Other authorities took a much more cautious and limiting view of judicial enforcement and drew a distinction between two Talmudic terms. See BABYLONIAN TALMUD, *supra* note 4, TOSAFOT, s.v. YOTZE, at 70a; RABBI ASHER BEN YECHIEL, PISKAI ROSH, YEBAMOTH, ch. 6. Any ground for which the Talmud states *kofin* ("we may coerce") is deemed sufficiently grave that physical threats and force may indeed be employed. If, on the other hand, the less emphatic term *yotzee* ("he shall [or must] divorce") is used, the court may issue the order but cannot impose any coercive measures other than those that are purely psychological, such as moral suasion or public proclamation of disobedience.

The *Mishna* employs the term *kofin* for cases of repulsive occupations and loathsome diseases, and uses the lesser term *yotzee* for refusals to provide material support or cohabitation. See BABYLONIAN TALMUD, *supra* note 4, KETUBOTH, at 77a; *id.*, YEBAMOTH ch. 6. Whether impotence is grounds for a *kofin* order or only *yotzee* is a matter of considerable disagreement. See GEVUROT ANASHIM, no. 42; TASHBATZ, no. 693 (both ruling that compulsion may not be employed, at least where the condition is treatable). But see BLEICH, *supra* note 12, at 102.

One undisputed instance where physical compulsion can clearly be employed is the case of a prohibited union, such as a Cohen marrying a divorcee. SHULCHAN ARUCH, *supra* note 15, EVEN HAEZER 154:20; *id.* at 154:21 (comment of Rema). According to Rosh, because the propriety of utilizing coercive measures in *yotzee* cases is a matter of dispute, the correct procedure is to abstain from employing such measures except where the term *kofin* is employed. He notes that the use of enforcement mechanisms that are excessive or unauthorized may not only be an abuse of judicial power but would render the resulting *get* a *meusah* (product of duress) and invalid, making any subsequent marriage adulterous. Thus, to this day, a judicial decree of divorce may take one of two forms: (1) a directive that the husband *must* divorce his wife; (2) a directive that the husband may be *compelled* to divorce his wife. From the perspective of moral and religious obligations, both are equally binding, but only the latter may be enforced through conventional mechanisms. The notion of a judicial order *not* subject to enforcement must certainly strike the conventional legal mind as odd. At least since Holmes, it is

*bais din* are entitled to great weight, and in the absence of fraud may well be conclusive (because classical *halacha* did not provide for automatic appellate review). Yet, in the absence of findings amounting to grounds for coercion, the decision of the *bais din* is nothing more than advisory and hortatory and could not trigger a *halachic* validation of a *get* executed in response to subsequent coercive measures. To the extent such findings are made, however, there is no *halachic* requirement that coercion be employed by the court system itself. In effect, the victim and her friends or relatives have a variety of self-help remedies ranging from invoking the secular courts to posting the husband's name and picture all over town, or in extreme cases, hiring a band of thugs to beat up the husband.<sup>81</sup>

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commonplace to regard the very meaning of a right as the remedy available for its vindication. See OLIVER WENDELL HOLMES, JR., COLLECTED LEGAL PAPERS 167, 168-71 (1920). Thus, one could not state that a woman has a "right" to divorce unless she could call upon the mechanism of the state to get it for her. Yet in a system where legal courts are also religious and moral educators and where rights and obligations have bases of authority that transcend human mechanisms of compulsion, such a concept is entirely understandable.

It is particularly important to note that a woman's subjective dissatisfaction with her marital relationship, even if it rises to the level of revulsion, does not constitute a *kofin* ground according to the vast majority of *halachic* authorities. See SHULCHAN ARUCH, *supra* note 15, EVEN HAEZER 77:2. But see RAMBAM, MISHNA TORAH, *supra* note 47, HILCHOT ISHUT 14:8.

Outside of the State of Israel, rabbinical courts have no power of compulsion in any event, so the distinction between the two forms of decree may appear at first glance to be merely academic. Such an impression would be erroneous. Even where *batei din* lack their own enforcement powers, the *kofin-yotzee* distinction continues to be critical. See *infra* text accompanying notes 246-256. *Halacha* generally permits the utilization of the secular court system to enforce the dictates of the *bais din*, and the use of the system may be obtained through the drafting of appropriate prenuptial agreements. It would seem, however, that this would be *halachically* acceptable only for a decree of *kofin* and not *yotzee*, because it is unlikely that *halacha* would allow a secular court to do what its own *bais din* cannot. Thus, the efficacy of *secular* enforcement depends directly on the understanding of this dichotomy.

81. To clear up a possible point of confusion, under classical *halacha*, a *bais din* is vested with the powers inherent in all courts to enforce compliance with their judgments through processes similar to levy and execution on property, incarceration, the imposition of fines, and even corporal punishment. Outside of the State of Israel, however, *batei din* are currently unable to exercise their enforcement powers as a matter of secular law. Accordingly, modern day enforcement of decisions of *batei din* is accomplished through moral persuasion, judicial enforcement, community pressure, or self-help. The point that such self-help may even take the form of threats or physical violence should not be taken to suggest that such measures are proper. Indeed, in the absence of any authorization by a court, they are clearly tortious under both secular and Jewish law. To the extent these unauthorized and unlawful measures are employed subsequent to a *bais din*'s bona fide determination that the granting of a *get* is mandatory, however, the *get* is no longer viewed to be a product of coercion. See *supra* note 79; text accompanying notes 78-80.



Certain types of pressure are not deemed sufficiently coercive to invalidate a *get*. For example, employing psychological pressure, organizing boycotts (even with economic impact), and posting signs apparently would not render the *get meusah* even in the absence of a decision of a *bais din*, although prior to such a decision employment of these measures is viewed as morally reprehensible.

Another category of pressure involves what might be termed "coercive circumstances arising from reasons unrelated to the *get* itself." This category was first recognized by the great Spanish authority, Rivash.<sup>82</sup> The case involved a person thrown into debtor's prison for nonpayment of a debt. His wife's relatives offered to satisfy the debt and obtain his release from prison on the condition that he would execute a *get* and divorce his wife. He willingly complied. In considering whether the *get* was a product of coercion, Rivash concluded that because the man "was not seized in order to divorce his wife but on account of his debt, the *get* is not coerced but is the product of free will."<sup>83</sup>

The theory appears to be that where the compelling event did not arise for the purpose of inducing a *get*, although the granting of the *get* will effectively remove the source of the compulsion, the *get* retains its validity. A modern example of this distinction might be a separation agreement where one spouse agrees to forego property or custody rights in exchange for a *get* (admittedly a reprehensible instance of blackmail). Although the execution of the *get* might in some sense be viewed as a means of escaping the financial burdens that would otherwise fall on the husband's shoulders, the *get* is seen as conferring a benefit rather than removing a compulsion.<sup>84</sup>

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82. See RABBI ISAAC BEN SHESHET (14th century Spain), TESHUVOT RIVASH no. 127 [hereinafter RIVASH].

83. *Id.*; see also *id.* at no. 132 (deciding that a violation of community ordinance prohibiting marriage in the absence of a quorum of 10 carried sanction of imprisonment; a commutation of sentence contingent on the execution of a *get* did not constitute duress); RABBI YOSEF COLON (15th century France and Italy), TESHUVOT MAHARIK no. 123 (concluding that where a person is imprisoned for offenses unrelated to the granting of a *get*, a refusal of the community to intervene until a *get* is granted is not coercive, but is simply a withholding of assistance). Whether this pressure could take the form of affirmative statements requesting a denial of clemency is debatable. See *infra* notes 85-88 and accompanying text; see also 1 RABBI MOSES BEN YOSEF TRANI (16th century Greece and Palestine), TESHUVOT MABIT no. 22 (invalidating a *get* where the Jewish community offered to secure the release of a citizen of Safed imprisoned for criminal activity by civil authorities if he would divorce his wife and leave the jurisdiction).

84. Indeed, this same result follows under common law. If I threaten to drown someone unless she agrees to a contract, any contract resulting from such a threat is voidable under duress. See RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 74, § 174. If, on the other hand, someone is already drowning and I offer to save him if he signs a

An interesting contemporary application arose in Israel, where by operation of law religious tribunals still maintain exclusive jurisdiction over marriage and divorce.<sup>85</sup> A young woman had married a man who was serving a four-year prison sentence in Israel for drug offenses. The wife petitioned for a divorce on the grounds of non-support and loss of consortium. The *bais din* directed the husband to execute the *get*, but did *not* find any grounds either under Israeli or Jewish law that would mandate the direct imposition of coercive sanctions such as additional imprisonment or fines.

The issue before the court was whether it was *halachically* proper to recommend parole or reduction of sentence in exchange for the husband's executing a *get*, and whether, conversely, the rabbinic tribunal could submit a recommendation against parole unless the *get* is executed. On one hand, the *get* is the mechanism by which the prisoner may obtain his freedom—if a person is told, "Sign the *get* or stay in jail," this resembles duress. Yet because the imprisonment was for an unrelated offense, the failure to give a *get* does not in and of itself result in direct coercion, but simply removes the extra privileges or benefits of parole that would otherwise ensue. An additional complication arose from the fact that the husband behaved abusively in the presence of the court, spitting and cursing at the judges. The prisoner's behavior clearly constituted contempt of court and could properly be taken into account as a factor bearing on "good moral character" in a parole hearing. The issue before the *bais din* was whether it could "forgive" his contempt and agree *not* to report it in exchange for a *get*.

In a two to one decision, the *bais din* ruled that it would be improper to threaten the husband with an explicit recommendation for denial of parole—such a recommendation would be tantamount to the imposition of additional punishment for the failure to give a *get*. Indeed, this would be so even if the recommendation were predi-

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contract, the resulting contract would not be voidable. See *id.* The distinction is based on the fact that duress renders a contract voidable only when the threat that induced the assent was "improper." See *id.* at § 175(1). A threat is "improper" if what is threatened constitutes a "crime" or a "tort." *Id.* at § 176(1)(a). Because Anglo-American law imposes no affirmative duty of rescue, threatening to "let" someone drown unless he consents is not tortious. See RESTATEMENT (SECOND) OF TORTS § 314 (1977). A fortiori, this would be true where the promisor is not faced with loss of life, but simply imprisonment or property forfeiture. The common law of contracts would probably come to the same conclusion as Rivash, Maharik, and Mabit.

85. For a thorough discussion of the case, see 2 BLEICH, *supra* note 12, at 94-103. See also 11 PISKEI DIN RABBONIVIM [DECISIONS OF RABBINIC TRIBUNALS], no. 10, at 300-08 (1978) (reporting case). The dissent by Rabbi Shlomo Dichovsky was published as a separate article in 1 TECHUMIN 248 (1980).

cated on the husband's abusive behavior rather than on the grounds of "bad moral character" for noncompliance with a court order.<sup>86</sup> The dissent took the position that even an explicit recommendation against parole constitutes only a denial of benefits.

One other major consideration applicable to indirect sanctions is whether the sanctions are themselves legitimate—the debt must be legally enforceable and the means employed must be legitimate. The execution of a *get* in order to escape payment of a debt that is not actionable at law is regarded as the product of duress even if the compulsion arises from reasons unrelated to the granting or withholding of the *get*.<sup>87</sup> Therefore, only forgiveness of a legitimate

86. The *bais din* found possible grounds to distinguish between a recommendation against parole and failure to make a positive recommendation for parole. The *bais din* is certainly entitled to condition any positive intervention on the prisoner's compliance with its decree. For the basis for this distinction, see RABBI COLON, *supra* note 83, at no. 123:

But if a person is imprisoned by gentiles because of taxes or some other matter, we may say to him, "We will not attempt to have you released from prison unless you divorce your wife with a valid *get*." This is not duress, because we are not doing him evil but are simply withholding assistance. Withholding assistance of a benefit is not considered duress.

*Id.* (author's translation).

The court's ruling, based on TESHUVOT MAHARIK, no. 123, that the granting of affirmative assistance may be made conditional on the granting of a *get*, has been followed by other rabbinical courts as well. For example, under Israeli law contracting marriage with a woman under the age of 17 is a criminal offense punishable by imprisonment or a fine. The rabbinical courts have routinely informed the violator that they will intercede and recommend a commutation of sentence upon execution of the *get*. Since the violator is imprisoned because of a violation of the criminal statute, which is totally unrelated to the granting of a *get*, the making or withholding of a clemency recommendation is not an act of compulsion. See also TESHUVOT RIVASH, no. 132 (violation of a local community ordinance forbidding the celebration of marriages without the presence of a quorum of ten; imprisonment subject to release upon execution of a *get* is a valid practice because the imprisonment is a sanction for violation of the ordinance). See generally Benjamin Rabinowitz-Teumin, *Self-Imposed Constraints in Divorce*, 1 NOAM 303 (1957-1958). Bleich regards these precedents as inconsistent with the majority's ruling. See 2 BLEICH, *supra* note 12, at 99-100. Somewhat confusingly, however, this assertion ignores the very distinction the court made—between the imposition of punishment and the denial of benefit. The court's whole point—and one that is surely debatable—is that a negative recommendation against parole (which would otherwise be granted) is closer to a new punishment than a withholding of a privilege, at least where it is premised on failure to grant a *get*. Bleich's point, however, may be cogent with respect to the report concerning courtroom abuse, because that is totally unrelated to the *get*.

87. See 1 TASHBATZ, no. 1. This is how the ruling is generally understood, but it is not entirely clear from TASHBATZ whether the basis for the holding is the inherent illegitimate nature of the means employed or the implication that the illegitimate threats were undertaken to compel a *get*. *Contra* TESHUVOT RANACH, no. 43 (violating community ban on marriages without a quorum did not justify the imposition of a prison sentence—detention on such grounds is therefore illicit and tortious. Nevertheless, if such a sentence has in fact been imposed, a commutation of sentence upon execution of *get* would

debt constitutes a proper inducement for divorce.<sup>88</sup>

## II. MECHANISMS OF CIVIL ENFORCEMENT: THE USE OF CONTRACT LAW

The limited enforcement powers of a *bais din* make enforcement through the secular judiciary an attractive alternative. Despite its considerable appeal and notwithstanding the fact that courts have been relatively sympathetic to the *agunah*'s tragic plight, reliance on the good will of courts can be legally problematic. Even worse, court intervention is also *halachically* questionable because in many cases *gittin* executed pursuant to court orders may be invalid as *get meusah*. Well-meaning courts, in their attempts to be solicitous of the needs of an *agunah*, often have simply been unaware of the interface of *halacha* and law to be considered. Nevertheless, many of these obstacles are surmountable, and the legal system can be responsive in a manner consistent with both constitutional principles and *halachic* directive.

Obligations imposed by religious law are not directly enforceable in civil courts of the United States, nor could they be under the Establishment Clause of the First Amendment.<sup>89</sup> Thus, the fact that Jewish law requires a marriage to be dissolved through the execution and delivery of a *get* would not alone furnish any basis for legal action to compel this result under secular law. There are a number of cases, however, where courts have been called upon to assist par-

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not render the *get* invalid as a *meusah*. The legitimacy of the sanction is irrelevant as long as it does not stem from the nondelivery of the *get*.). See also TESHUVOT RIVASH, no. 132 (validating the *get* under these circumstances, but on the alternative theory that incarceration is in fact a *legitimate* communal sanction for violation of such an ordinance).

88. Here too there is a close common-law parallel. A promise to perform *X* in exchange for the forgiveness of debt *Y* may be an invalid product of duress if debt *Y* is a clearly unenforceable claim. Nevertheless, the promisee need not establish that he would have succeeded on the merits, but merely that the asserted claim that is being forgiven has a reasonable basis and is not entirely frivolous. Moreover, even where the "forgiven debt" is not actionable, a promise obtained in exchange for its release will not necessarily be voidable if defending against the unenforceable claim constituted a "reasonable alternative." See John P. Dawson, *Duress Through Civil Litigation: I*, 45 MICH. L. REV. 571 (1947); E. ALLAN FARNSWORTH, CONTRACTS, § 4.17, at 276 (2d ed. 1990); RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 74, § 175, cmt. b (stating that even where a threat is improper, it will *not* constitute duress if it allows the victim a reasonable alternative). The ability to assert a defense against a frivolous claim normally constitutes such an alternative unless particularly oppressive tactics are employed. From a Jewish law perspective, it is not clear whether being put to the burden of litigating constitutes a reasonable alternative. Nevertheless, the concept of "reasonable alternatives" negating *get meusah* has been recognized by at least some authorities. See 2 TESHUVOT MABIT, no. 138.

89. See *infra* Subpart II.A.3.

ties in vindicating their rights under Jewish law, usually on some theory of express or implied contract.

*A. Express or Implied Promises to Give a Get*

1. *Case Law.*—Cases involving religious divorce disputes fall into a variety of categories. The simplest group involves express agreements to grant a *get* once the parties obtain a civil dissolution. Typically, in this scenario, the husband fails to comply with his contractual undertaking and the wife, alleging the inadequacy of damages, brings an equitable action for specific performance. Courts in Florida, Ohio, and Pennsylvania have refused to enforce these agreements, either on the theory that judicially compelling a religious divorce would excessively entangle the state in sectarian matters, offending the Establishment Clause, or on the narrower ground that such an order is beyond the statutory jurisdiction of the court.<sup>90</sup> One court indicated that compelling a religious divorce

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90. See *Turner v. Turner*, 192 So. 2d 787 (Fla. Dist. Ct. App. 1966) (holding by divided court that a provision in a final decree of divorce ordering the husband to cooperate with his wife in obtaining a Jewish divorce was unenforceable), *cert. denied*, 201 So. 2d 233 (Fla. 1967); *Steinberg v. Steinberg*, No. 44125, 1982 WL 2446, at \*4 (Ohio Ct. App. June 24, 1982) (holding that a provision in a separation agreement and divorce decree obligating the wife to obtain a Jewish divorce was unenforceable); *Price v. Price*, 16 Pa. D. & C. 290, 291 (1932) (holding that court had “no right to order anyone to consent to any kind of divorce—whether it be civil or religious”).

Technically, in *Turner*, the court’s holding rested on the narrow notion that the Chancellor had no statutory authority to impose such a requirement in a divorce decree, but arguably, such a requirement could be enforced as a simple contract. See *Turner*, 192 So. 2d at 788. Nevertheless, the language of the opinion strongly suggests serious First Amendment concerns.

These concerns formed the explicit basis of the holding in *Steinberg*, a somewhat unusual case. *Steinberg* involved a recalcitrant wife who refused to *accept* a *get* after a separation agreement was incorporated into a divorce decree providing for alimony in favor of her, but conditioning receipt of that benefit on her cooperation in obtaining a religious divorce. See *Steinberg*, No. 44125, 1982 WL, at \*1. The wife filed a motion to vacate the part of the order that conditioned her alimony entitlement on compliance with religious law. *Id.* at \*2. The trial court granted her motion and ordered the husband to pay alimony arrearages notwithstanding her lack of cooperation. The court’s order was affirmed on appeal. *Id.* at \*5. The appellate court stated that it was obvious that a court could not enforce through its contempt power any clause requiring a party to participate in a religious ceremony and, therefore, a court may not do indirectly (through the withholding of alimony) what it could not accomplish directly. *Id.* at \*4-5. The correctness of this last assertion is open to question, but it is abundantly clear that the Ohio court would not sanction direct enforcement of a promise to give or receive a *get* because such an order is violative of the First Amendment.

Finally, in *Price*, a Pennsylvania court denied, on Free Exercise grounds, a wife’s request for specific performance of a prenuptial agreement to give a *get* in the event of a civil divorce. *Price*, 16 Pa. D. & C. at 291 (“The civil tribunals are certainly without

may also violate the Free Exercise Clause.<sup>91</sup>

Courts in other jurisdictions, however, have enforced similar contractual provisions to give a *get*.<sup>92</sup> For example, in *Koeppel v. Koeppel*,<sup>93</sup> a wife brought suit to compel her husband to comply with an agreement to execute a *get* upon the grant of a civil divorce.<sup>94</sup> The husband moved for a dismissal on the grounds that enforcement of such a provision contravened his First Amendment freedoms.<sup>95</sup> In denying the motion to dismiss, the court stated:

Defendant has also contended that a decree of specific performance would interfere with his freedom of religion under the Constitution. Complying with his agreement would not compel the defendant to practice any religion, not even the Jewish faith to which he still admits adherence . . . . His appearance before the Rabbinate . . . is not a profession of faith. *Specific performance herein would merely require the defendant to do what he voluntarily agreed to do.*<sup>96</sup>

Thus, the mere fact that a ceremony, procedure, or activity is governed by religious law does not preclude its civil enforcement by way of a simple contract.<sup>97</sup> Other cases in New York, at least at the trial level, have reached the same result, though the holdings are inconsistent.<sup>98</sup>

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authority to order one to follow the practices of his faith. This is a matter dependent entirely upon his conscience, or upon his religious belief.").

91. See *Price*, 16 Pa. D. & C. at 291.

92. See, e.g., *Feuerman v. Feuerman*, Civil No. 83-267188 (Mich. 6th Jud. Cir. Aug. 1, 1984) (ordering specific performance of an agreement to obtain a Jewish divorce where such agreement was embodied in settlement papers).

93. 138 N.Y.S.2d 366 (N.Y. Sup. Ct. 1954).

94. *Id.* at 370.

95. *Id.* at 373.

96. *Id.* (emphasis added). After trial, however, the court ruled that the agreement was too indefinite and therefore unenforceable. See *Koeppel v. Koeppel*, 161 N.Y.S.2d 694, 695-96 (N.Y. App. Div. 1957). Under the language of the agreement, the husband was obligated to grant his wife a religious divorce only if "necessary." *Id.* Because the wife remarried prior to obtaining the *get*, the court found that the requisite showing of "necessity" could not be made. See *id.*

97. Cf. *Gordon v. Gordon*, 140 N.Y.S.2d 878 (N.Y. Sup. Ct. 1955) (denying enforcement of a *get* agreement because such a contract violated a state statute prohibiting private agreements to void marriages).

98. See *Waxstein v. Waxstein*, 395 N.Y.S.2d 877 (N.Y. Sup. Ct. 1976) (granting specific performance of a promise to give a *get* where the promise was part of an integrated separation agreement, and the wife had complied with her part of the deal), *aff'd*, 394 N.Y.S.2d 253 (N.Y. App. Div.), *appeal denied*, 367 N.E.2d 660 (N.Y. 1977); see also *Rubin v. Rubin*, 348 N.Y.S.2d 61 (N.Y. Fam. Ct. 1973) (Rubin is a fictitious name used for publication purposes; the opinion was authored by a judge who also happens to be an ordained Rabbi.).

In *Waxstein v. Waxstein*,<sup>99</sup> a wife sought specific performance of a provision in the couple's separation agreement that required the husband to execute a *get*.<sup>100</sup> The court noted the inherent unfairness of permitting the husband to receive the benefits of the agreement without complying with its relatively light burdens.<sup>101</sup> While *Waxstein*, unlike *Koeppel*, is an actual decision on the merits, its holding may be limited to cases where the party who desires the *get* has already completely performed his or her part of the agreement.<sup>102</sup> Nevertheless, from the standpoint of constitutional law, this distinction appears to be immaterial.

In another case, *Rubin v. Rubin*,<sup>103</sup> the parties had executed a separation agreement that made support and alimony contingent upon the wife's acceptance of a *get*.<sup>104</sup> The wife refused to cooperate in the *get* process, but nonetheless sued for alimony arrearages.<sup>105</sup> In denying her request, Judge Gartenstein noted that a number of New York courts have enforced a contractual undertaking to give a *get*.<sup>106</sup> Even under rulings that denied direct enforcement of a *get* promise, however, Mrs. Rubin was not entitled to the relief she sought.<sup>107</sup> The court sharply differentiated between a *get* as a promise and a *get* as a *condition*:

[T]his court is not called upon to enforce this religious discipline against a recalcitrant party, but, rather, is being called upon by the *defaulting* party to enforce other relief in her favor at a time when she refuses to perform a condition precedent thereto, which happens to be an act of religious significance. The condition precedent could well have been anything else made crucial by agreement of the parties. . . . [W]here one party to an agreement calling for a *Get* declines to perform, the court will either refuse any relief to the defaulting party, or will hold any application for the same in abeyance pending performance of the obligations assumed pertaining to the *Get*.<sup>108</sup>

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99. 395 N.Y.S.2d 877 (N.Y. Sup. Ct. 1976), *aff'd*, 394 N.Y.S.2d 253 (N.Y. App. Div.), *appeal denied*, 367 N.E.2d 660 (N.Y. 1977).

100. *See id.* at 879.

101. *See id.* at 880.

102. *See id.* at 880-81.

103. 348 N.Y.S.2d 61 (N.Y. Fam. Ct. 1973).

104. *See id.* at 63.

105. *Id.*

106. *See id.* at 67.

107. *Id.*; *see, e.g.*, *Margulies v. Margulies*, 344 N.Y.S.2d 482 (N.Y. App. Div.), *appeal dismissed*, 307 N.E.2d 562 (N.Y. 1973).

108. *Rubin*, 348 N.Y.S.2d at 67.

While the *Rubin* court did not expressly rule on whether promises to execute a *get* are directly enforceable, failure to carry out such undertakings may constitute the nonoccurrence of a condition precedent barring the recalcitrant party from asserting other benefits under the agreement. Thus, a prenuptial or separation agreement conditioning various benefits on the execution of a *get* may well have the desired effect of indirectly inducing compliance.<sup>109</sup>

The more problematic New York case is *Margulies v. Margulies*,<sup>110</sup> where the husband had agreed orally in open court to give a *get* to his wife and the stipulation was entered as a court order.<sup>111</sup> Based on his disregard of the order, the husband was held in contempt twice, and fined subject to the provision that he could purge himself of the contempt upon payment of the fines and appearance before a rabbinical court to execute a *get*.<sup>112</sup> Upon his continued refusal to comply, the husband was committed to jail for fifteen days.<sup>113</sup> The Appellate Division reversed the imposition of imprisonment, but allowed the fines to stand.<sup>114</sup>

*Margulies* is difficult because the court agreed with the husband's contention that it was without power under the First Amendment to order him to perform a religious act; yet, it allowed the fines to stand.<sup>115</sup> Rabbi Irwin Haut suggests that by sustaining the fines, the court demonstrated that it was in fact amenable to enforceability through sanctions less drastic than imprisonment.<sup>116</sup> This reading appears to be incorrect, as does the court's holding. The court apparently would deny any enforcement of contracts to give a *get*, but it sustained the fines exclusively on technical procedural grounds—failure to appeal.<sup>117</sup> It must be said, however, that the reversal of the imprisonment and affirmation of the fines are constitutionally difficult to reconcile.<sup>118</sup>

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109. *Accord* B. v. B., N.Y.L.J., May 4, 1978, at 7 (N.Y. Sup. Ct. 1978). *But see* Steinberg v. Steinberg, No. 44125, 1982 WL 2446, at \*4 (Ohio Ct. App. June 24, 1982) (holding that the use of the *get* clause as a condition precedent is an unconstitutional form of indirect compulsion); *supra* note 90.

110. 344 N.Y.S.2d 482 (N.Y. App. Div.), *appeal dismissed*, 307 N.E.2d 562 (N.Y. 1973).

111. *See id.* at 484.

112. *See id.*

113. *Id.*

114. *See id.* at 483-84.

115. *See id.*

116. *See* RABBI IRWIN HAUT, DIVORCE IN JEWISH LAW AND LIFE 73-74 (1983).

117. *See Margulies*, 344 N.Y.S.2d at 484-85.

118. *See id.* at 485 (Nunez, J., dissenting) (arguing for reversal of all sanctions). The sorry aftermath of this case may be seen in the fact that, over six years later, Mrs. Margu-



A second line of cases has gone considerably further. Even in the absence of an express agreement to give or receive a *get*, some courts have been willing to infer such an agreement from the fact that the parties solemnized their marriage in accordance with religious tradition, recited a formula at the ceremony that the marriage was in "accordance with the laws of Moses and Israel," or executed the traditional *ketubah*<sup>119</sup> or marriage contract. The first recorded case of a spouse petitioning the court for an order compelling the granting of the *get* on the basis of the *ketubah* alone occurred in Canada. In *Morris v. Morris*,<sup>120</sup> the trial court sustained the wife's contention that the *ketubah* constituted a civilly enforceable contract to grant a *get* upon civil dissolution and entered an order of specific performance to that effect.<sup>121</sup> The decision was reversed by the Manitoba Court of Appeals, and Mrs. Morris did not pursue further avenues of review.<sup>122</sup> Nevertheless, the ceremony-*ketubah* argument has been accepted by various trial courts in Illinois, New Jersey, and New York, all of which have entered *get* orders, even in the absence of an express prenuptial agreement to that effect.<sup>123</sup>

The earliest such case in the United States, *Stern v. Stern*,<sup>124</sup> involved a couple who had been married in a Jewish ceremony during which the groom gave the bride a *ketubah* in which he stated that she was his wife in accordance with the laws of Moses and Israel.<sup>125</sup> Mrs. Stern later sued her husband for divorce; he countersued, al-

lies' motion for attorney's fees incurred in her still unsuccessful attempts to obtain a *get* were denied. See *Margulies v. Margulies*, 418 N.Y.S.2d 550 (1979).

119. The *ketubah* (writing) is a standard document written in Aramaic setting out the obligations of a husband toward his wife. Dating from before the Common Era, its purpose was to discourage the husband from exercising what was originally his unilateral power of divorce. See Solomon Zeitlin, *The Origin of the Ketubah: A Study in the Institution of Marriage*, 24 JEWISH Q. REV. 1 (1933-1934). The Conservative movement utilizes a slightly different text, while the Reform movement does not use a *ketubah* at all (though the bridal couple may have one if they wish). The *ketubah* is executed and signed by two witnesses immediately before the wedding ceremony and remains the wife's property. The *ketubah* is also publicly read at the wedding ceremony, though usually left untranslated, so that few in the audience know what they are hearing. For an extensive discussion of the *ketubah*, see *infra* text accompanying notes 151-157.

120. 36 D.L.R.3d 447, *rev'd*, 42 D.L.R.3d 550 (1973).

121. See *id.* at 455.

122. See 42 D.L.R.3d 550 (1973).

123. See *In re Marriage of Goldman*, 544 N.E.2d 1016 (Ill. App. Ct.), *appeal denied*, 555 N.E.2d 376 (Ill. 1990); *Burns v. Burns*, 538 A.2d 438 (N.J. Super. Ct. Ch. Div. 1987); *Minkin v. Minkin*, 432 A.2d 665 (N.J. Super. Ct. Ch. Div. 1981); *Stern v. Stern*, 5 Fam. L. Rep. (BNA) 2810 (N.Y. Sup. Ct. Aug. 7, 1979).

124. 5 Fam. L. Rep. (BNA) 2810 (N.Y. Sup. Ct. Aug. 7, 1979).

125. *Id.* at 2811.

leging adultery.<sup>126</sup> On the basis of expert testimony, the court found that under Jewish law the husband was obligated to give an adulterous wife a bill of divorce and entered an order to that effect.<sup>127</sup> The court found no First Amendment barrier in imposing such an obligation because rules in Jewish law that govern the relationship of human beings to each other are "secular" in nature rather than religious.<sup>128</sup>

In *Minkin v. Minkin*,<sup>129</sup> the court held that compelling issuance of a *get* is not a prohibited establishment of religion because such an order has a "clear secular purpose" of completing the process of dissolution.<sup>130</sup> Moreover, because the *get* does not involve a "profession of faith" and the court is simply requiring the husband to do what he voluntarily agreed to do, there was no infringement of "free exercise" rights.<sup>131</sup>

Both *Stern* and *Minkin* may be limited to cases where divorce is mandatory under Jewish law, and they do not stand for the proposition that the terms of the *ketubah* create an implied contractual obligation to grant a *get* whenever there is a civil dissolution. Nevertheless, constitutionally, whether a divorce is mandated by Jewish law is irrelevant. Thus, the inescapable logic of *Stern* and *Minkin* leads to the conclusion that an express agreement to give a *get* would always be enforceable in court whether or not Jewish law made a divorce mandatory.

The *Stern-Minkin* decisions were broadened by a later New Jersey case, *Burns v. Burns*.<sup>132</sup> After obtaining a judgment for divorce, Michelle Burns filed a post-judgment motion seeking an order compelling her former husband to issue a Jewish bill of divorce.<sup>133</sup> The court, relying on *Minkin*, refused to limit that case to adultery, and held that in every case of civil dissolution, the *ketubah* imposes an affirmative obligation on the parties to dissolve the bonds of matrimony in a religiously appropriate manner.<sup>134</sup>

The court rejected Mr. Burns's free exercise claim based in part on evidence that he was willing to give a *get* in exchange for a

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126. *Id.*

127. *Id.*

128. *Id.*

129. 434 A.2d 665 (N.J. Super. Ct. Ch. Div. 1981).

130. *Id.* at 668.

131. *Id.*

132. 538 A.2d 438 (N.J. Super. Ct. Ch. Div. 1987).

133. *See id.* at 439.

134. *See id.* at 440-41.

\$25,000 payment.<sup>135</sup> Noting that a "true religious belief is not compromised as the amount of money demanded is increased" and that such an "offer" is akin to extortion and beyond the pale of the First Amendment, the court concluded that no religious freedoms were infringed.<sup>136</sup> This is a fundamentally different approach than the court took in *Minkin* when it flatly asserted that the giving of a *get* is not a religious act at all.<sup>137</sup> On the other hand, because *Burns* does cite *Minkin* extensively, and approvingly, it may very well be that the *Burns* court would have come out the same way, even if Mr. Burns were not acting for pecuniary gain.

Unlike the courts in *Stern* and *Minkin*, however, the *Burns* court did not directly order the husband to execute a *get*, but ordered him to submit to the jurisdiction of a rabbinical court and initiate the *get* procedure.<sup>138</sup> While the *Burns* opinion makes a number of errors concerning Jewish law—for example, it describes a *get* as evidence of a divorce, and it misinterprets the *ketubah*—its amended order is much more consistent with the dictates of *halacha* than the *Stern-Minkin* analogue.<sup>139</sup>

The most recent case in this area, and especially significant as the first appellate case to construe the *ketubah* as an implied contract to give a *get*, is *In re Marriage of Goldman*.<sup>140</sup> Kenneth and Annette Goldman were married in a Reconstructionist Jewish ceremony.<sup>141</sup> During the ceremony, a standard Orthodox *ketubah* purchased in a Jewish bookstore was signed.<sup>142</sup> Neither party was an Orthodox Jew at the time of the marriage, but Annette became Orthodox during the course of her marriage.<sup>143</sup> Kenneth later petitioned for dissolu-

135. See *id.* at 440.

136. *Id.*

137. See *Minkin*, 434 A.2d at 667.

138. See *Burns*, 538 A.2d at 441 ("The ultimate decision of whether a 'get' is to be granted is that of the 'Bet Din' and not of this court.").

139. See *id.* at 439-41.

140. 554 N.E.2d 1016 (Ill. App. Ct.), *appeal denied*, 555 N.E.2d 376 (Ill. 1990).

141. *Id.* at 1018.

142. *Id.*

143. *Id.* at 1019. A crucial point that the court simply glosses over is that the *get* is required for dissolution only in the Orthodox and Conservative traditions and not in the Reform or Reconstructionist traditions. See *supra* note 5. If the marriage were solemnized pursuant to Reconstructionist rites, therefore, there could not be an implied understanding that *halacha* would govern the dissolution. See *infra* text accompanying notes 151-152. The court did note, however, that Kenneth had given his prior wife a *get* and had told Annette that Jewish marriage requires a Jewish divorce. See *id.* at 1019. He had never specifically told Annette that he would give her a *get* in the event of civil dissolution. See *id.*

tion of the marriage and custody of their two children.<sup>144</sup> Annette counter-petitioned for divorce, custody, and specific performance of the *ketubah* as a premarital contract that stipulated that the existence and dissolution of their marriage would be governed by Orthodox Jewish law.<sup>145</sup> Kenneth refused to give her a *get*, and some evidence was introduced that he was using the *get* as leverage to obtain joint custody of the children.<sup>146</sup> The trial court found that the parties' intention at the time they signed the *ketubah* was to "have the marriage recognized by the Orthodox branch of Judaism"; based on expert testimony, "the *ketubah* clearly and unequivocally obligates the husband to proceed with the *get* procedure"; and Kenneth's extreme dislike for Orthodox Judaism did not rise to the level of a religious belief entitled to free exercise protection.<sup>147</sup> The court ordered that Kenneth comply with his contractual obligation to give Annette an Orthodox *get*.<sup>148</sup>

On appeal, Kenneth raised three arguments: the *ketubah* is not a legally enforceable contract, its terms were too vague to support a decree of specific performance, and the order violated the Establishment and Free Exercise Clauses.<sup>149</sup> The Illinois appellate court rejected all of these contentions in a two to one decision and allowed the circuit court's ruling to stand.<sup>150</sup>

Cases like *Stern*, *Minkin*, *Burns*, and *Goldman* pose problems from a number of perspectives. In particular, as a matter of contract, constitutional law, and *halacha*, their reasoning is somewhat deficient.

2. *Contract Law Issues.*—*Halacha* requires that a *ketubah* be executed at or before a marriage ceremony.<sup>151</sup> To this day, all Orthodox and Conservative weddings utilize a *ketubah* in substantially the same form it traditionally had been used, while in Reform and Reconstructionist ceremonies, it is regarded as optional.<sup>152</sup> The *ketubah* is a document written in the form of a series of promises or commitments that resemble what would be termed "contracts."

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144. *Id.*

145. *Id.*

146. *Id.* at 1020.

147. *Id.* at 1020-21.

148. *Id.* at 1021.

149. *Id.*

150. *Id.* at 1021-25.

151. *See supra* note 119.

152. *See In re Marriage of Goldman*, 554 N.E.2d 1016, 1018 (Ill. App. Ct.) (employing an Orthodox *ketubah* although their ceremony followed the Reconstructionist rite), *appeal denied*, 555 N.E.2d 376 (Ill. 1990).

These promises, all of which are made by the husband to the wife,<sup>153</sup> include:

(1) a declaration that he has betrothed his wife in accordance with the laws of Moses and Israel;

(2) a promise that he will honor, support, and work for his spouse in accordance with the custom of Jewish husbands;

(3) an obligation to provide food, clothing, and intimacy in accordance "with universal custom";

(4) an agreement to pay an alimony lump sum of 200 silver zuz<sup>154</sup> in the event of divorce or death;

(5) an agreement to pay a stipulated monetary value for property that the wife brings into the marriage;

(6) a promise to pay an additional alimony sum in excess of the statutory minimum; and

(7) the creation of a lien on all real or personal property, whether presently owned or after-acquired, to secure payment of all obligations under the *ketubah*.

The *ketubah* is then signed by two witnesses, who affirm that the groom agrees to be bound. There is no requirement that the bride or groom sign, although it has become customary in many circles for them to do so.

Significantly, the *ketubah* is written in a difficult Aramaic, frequently without a translation. Even where some English words do appear, the legal portions of the *ketubah* are rarely reproduced in English. The "translation" may say, for example, that the parties pledge mutual affection and love or other generalized sentiments that do not even appear in the traditional text.

Among many, if not most couples, there is substantial ignorance as to what the *ketubah* says, and even officiating rabbis, particularly if they are not Orthodox, regard the *ketubah* as part of a religious ceremony, but not as something generating legally enforceable relationships.<sup>155</sup> Thus, although the *ketubah* is in the legal form of a contract (at least a unilateral one), in many cases it could

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153. The *ketubah* does state, however, that the bride has agreed to become the groom's spouse, which may suffice as a recital of consideration. See *supra* note 119.

154. The "dowry of the virgins" mentioned in the Bible is stated as 50 *shekels* or 200 zuz or *dinar*. This is the sum that is currently stipulated in the Orthodox *ketubah*. See *infra* note 260.

155. See, e.g., *In re Marriage of Goldman*, 554 N.E.2d at 1020. In *Goldman*, the parties' own officiating Rabbi stated that "as a liberal Jew, he viewed the *ketubah* in a symbolic rather than literal sense." *Id.* Kenneth himself testified that he regarded the *ketubah* as art or poetry. *Id.* While this may have been a self-serving statement, it probably accu-

give rise to no civilly enforceable rights because of a clear absence of contractual intent.<sup>156</sup> While this factor alone would not necessarily preclude enforcement, at the very least it could and should impose a heavy burden of proof on the party seeking enforcement.<sup>157</sup>

Even assuming that in a given case the terms of the *ketubah* can be regarded as giving rise to an enforceable contract, the question becomes: Contract for what? Certainly, the *ketubah* contains legally ascertainable commitments with respect to alimony and property settlements,<sup>158</sup> but it mentions nothing with respect to the granting

rately reflects the widespread ignorance by the American Jewish community about its religious traditions.

156. Although actual subjective intent to be bound is not an essential element to enforce an otherwise valid contract if the other party reasonably believed there was contractual intent, no contract is formed where neither party intended to be bound, or each party was aware that the other party lacked such intent. See RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 74, § 201. See generally FARNSWORTH, *supra* note 88, §§ 7.7-7.13 (discussing the interpretation of contract language); E. Allan Farnsworth, "Meaning" in the Law of Contracts, 76 YALE L.J. 939 (1967) (examining the conflicting assumptions courts make in interpreting contract language).

While the absence of intent to be bound would preclude civil enforcement, it has no bearing on the obligatory nature of the *ketubah* under *halacha*. Although the *ketubah* is phrased in the form of a consensual undertaking, in reality its obligations are largely statutory. Even in the absence of a written *ketubah*, a husband is still obligated to provide spousal support and the designated alimony and property settlements. See SHULCHAN ARUCH, *supra* note 15, EVEN HAEZER 66:9. Thus, for the most part, the *ketubah* as a document is a confirmation or memorial of religious law, rather than a source of consensual obligation. Additionally, under Jewish law mental reservations or lack of intent normally do not avoid expressions of commitment. See generally BABYLONIAN TALMUD, *supra* note 4, KIDDUSHIN, at 49b; RAMBAM, MISHNA TORAH, *supra* note 47, HILCHOT ISHUT 8:6.

157. In *In re Marriage of Goldman*, the trial court placed heavy reliance on Annette's recollection of conversations with Kenneth in which the *ketubah* was described as a contract. See *Goldman*, 554 N.E.2d at 1019. Kenneth denied these conversations. See *id.* In affirming the trial court's decision, the appellate court simply noted that it was well within the trial court's discretion to determine the credibility and weight of opposing testimony. *Id.* at 1021. In most cases, however, there will be virtually no evidence to support a finding of contractual intent.

158. As early as 1917, the Supreme Court of New Jersey ruled that the property settlement provisions of the *ketubah* were enforceable as separation agreements despite their "unusual" terminology. See *Goldstein v. Goldstein*, 101 A. 249, 249-51 (N.J. 1917). A more questionable interpretation of the *ketubah* appears in *Wener v. Wener*, 301 N.Y.S.2d 237 (N.Y. Sup. Ct. 1969), *aff'd*, 312 N.Y.S.2d 815 (N.Y. App. Div. 1970). In *Wener*, a wife filed for divorce and sought support for a child whom the couple had taken into their home during their marriage, but had never formally adopted. *Id.* at 238. In holding that the husband was primarily liable for the child's support, the court relied in part both on the agreement in the *ketubah* to perform all "obligations 'as . . . prescribed by [Jewish] religious statutes'" and on Jewish law, which holds the head of a household who takes a child into his home liable for the child's support. *Id.* at 240-41.

The *Wener* decision poses problems on two grounds. First, it is not at all clear that Jewish law compels support of stepchildren in the absence of an express contract to that effect. See SHULCHAN ARUCH, *supra* note 15, EVEN HAEZER 114:1. Second, even if it did,

of a divorce. Language to the effect that the husband betroths his wife "in accordance with the laws of Moses and Israel" can hardly mean a blanket agreement that all aspects of their family life shall be conducted in accordance with the dictates of Jewish law. No one would suggest, for example, that if one party failed to observe the Sabbath or ate nonkosher food, the other party could bring an action for damages, or even worse, a suit for specific performance. Indeed, even an express agreement to this effect arguably could not be enforced because of the First Amendment.

Apparently, cases like *Minkin*, *Burns*, and *Goldman* employ the following syllogism:

Major premise: An agreement to marry in accordance with the laws of Moses and Israel, while imposing no obligation on how the parties will live, does mean that the parties will comply with all *halachic* obligations pertaining to the creation and dissolution of their marriage.

Minor premise: In order to dissolve a marriage according to *halacha*, a *get* must be executed and delivered.

Conclusion: Therefore, the husband must execute a *get* whenever the marriage is civilly dissolved because that is what he agreed to do.

This syllogism is seriously flawed. First, the basis for the major premise appears to be incorrect. A "marriage in accordance with the laws of Moses and Israel" is not understood by Jewish law to connote any type of advance commitment to comply with Jewish divorce procedures. While the requirement to obtain a *get* does indeed apply, it is not because of any agreement to that effect; it is simply self-executing. It is difficult to see how a court can construe a clause as requiring compliance with Jewish law, if Jewish law itself does not so interpret it.

Second, the minor premise is flawed because of a confusion in the term "obligation." Even if the *ketubah* constitutes an agreement to comply with all *halachic* obligations pertaining to the creation and dissolution of the marriage, strictly speaking the execution of a *get* is normally not an obligation. It is true that no marriage may be *halachically* dissolved unless a *get* is granted, and in that particular

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there is no mention of such an obligation in the *ketubah* and thus, civil recognition of a *halachic* imperative cannot be based on contract. Although *Wener* was affirmed, the Appellate Division specifically disapproved of the court's reliance on the *ketubah*. See *Wener v. Wener*, 312 N.Y.S.2d 815, 819 (N.Y. App. Div. 1970); see also *Hurwitz v. Hurwitz*, 215 N.Y.S. 184, 188-89 (N.Y. App. Div. 1926) (enforcing property settlement based on *ketubah*).

sense a *get* is an "obligatory" step in the process of dissolution. The *get* itself, however, is not "obligatory" because the husband in many cases is under no obligation to dissolve the marriage.<sup>159</sup> While such an obligation does exist in cases where the wife is suspected of adultery, in many other cases it may not. The question of whether it does poses extraordinarily difficult issues of Jewish law that would invariably entangle the court in complex religious issues beyond its competence, and indeed, beyond its constitutional authority.<sup>160</sup>

3. *First Amendment Concerns*.<sup>161</sup>—The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>162</sup> Because the granting of a *get* occurs at a ceremony, the validity of which derives from the strictures of Jewish law, recalcitrant parties have argued that judicial intervention in securing a *get* violates their free exercise rights, which above all require "that religion must be a private matter,"<sup>163</sup> or alternatively, that judicial intervention constitutes an impermissible establishment of religion.

In a pluralistic society, persons with religious beliefs may suffer various disabilities, disadvantages, or restrictions as compared to persons not sharing those beliefs. Facially neutral laws of general, across-the-board applicability may have a significant, varying impact on the adherents of certain religions, imposing special costs or burdens on their practitioners.<sup>164</sup> What government may or must do about this situation has long been a conundrum of constitutional law, a problem arising from the conflicting messages of two portions of the First Amendment.<sup>165</sup> The Establishment Clause seems to require an impenetrable "wall of separation between church and State"<sup>166</sup> necessitating a strictly "hands-off" attitude.<sup>167</sup> The dic-

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159. See *supra* note 41 and accompanying text.

160. See *infra* note 308 (discussing *Lemon v. Kurtzman*, 403 U.S. 602 (1971)).

161. The text in this section applies the traditional constitutional standards that have been employed by the Supreme Court in analyzing establishment and free exercise claims. These standards are in the process of undergoing reexamination. Current developments and speculations as to the future are discussed *infra* Part V.

162. U.S. CONST. amend. I.

163. See *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971).

164. See, e.g., *Braunfeld v. Brown*, 366 U.S. 599, 601, 605 (1961) (upholding constitutionality of Sunday closing laws as applied to Sabbath-observing Jews who would lose an extra day of business).

165. See *Walz v. Tax Comm'n*, 397 U.S. 664, 668-69 (1970) ("The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.").

166. See *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) (quoting Thomas Jefferson).



tates of free exercise, on the other hand, seem to compel the government to structure its programs in a manner that will not adversely affect or inhibit religious practice.<sup>168</sup> The inescapable conflict between the prohibition of establishment and the necessity, or at least permissibility, of reasonable accommodation—the most difficult issue of church-state law—has never been definitively resolved.<sup>169</sup>

Scholars have attempted to propose their own analytic frameworks in reconciling the two clauses, though none of their approaches has been consistently applied by the Supreme Court.<sup>170</sup> At one extreme, Professor Philip Kurland has argued that the First Amendment compels a government stance of strict neutrality;<sup>171</sup> the government may not use religious criteria “either [to] confer a benefit or to impose a burden” upon individuals.<sup>172</sup> Under Kurland’s approach, it would be constitutionally impermissible to grant religious exemptions from otherwise valid general legislation. At the other extreme are commentators who take the position that governmental action to remove barriers or costs associated with religious exercise is a permissible accommodation.<sup>173</sup> Yet a third school of

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Whether Jefferson himself meant for the wall of separation to be absolutely impregnable is open to question. See, e.g., *McCollum v. Board of Educ.*, 333 U.S. 203, 238-56 (1948) (Reed, J., dissenting) (demonstrating that both Jefferson and Madison were in favor of allowing prayers and religious education on the publicly funded campus of the University of Virginia as long as no activities were compulsory).

167. See Tanina Rostain, *Permissible Accommodations of Religion: Reconsidering the New York Get Statute*, 96 YALE L.J. 1147, 1152 (1987) (“In situations where government must choose between infringing upon or facilitating religious exercise, the free exercise clause requires that . . . government choose the latter course.”).

168. See *id.* at 1149.

169. The recent case of *Employment Div., Dep’t of Human Resources v. Smith* (*Smith II*), 494 U.S. 872 (1990), discussed at length *infra* Part V, does resolve part of this historic dilemma. It is no longer constitutionally necessary for federal or state legislation of general applicability to carve out a religious exemption or accommodation. Nevertheless, even after *Smith II*, such accommodations may be permissible. See *Smith*, 494 U.S. at 890. It therefore still is necessary to determine at what point reasonable accommodation turns into impermissible establishment. *Smith II* partially reformulates the question but does not dispel it entirely.

170. See Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961) [hereinafter Kurland, *Of Church and State and the Supreme Court*]; see also Paul A. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969); Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3 (1978).

171. See Kurland, *Of Church and State and the Supreme Court*, *supra* note 170, at 96.

172. *Id.*

173. See Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1; see also Jesse H. Choper, *The Establishment Clause and Aid to Parochial*

thought would differentiate based on the type of barrier the government is trying to remove, arguing that while the Free Exercise Clause may indeed compel the removal or mitigation of barriers that are the products of the government's own laws, the Establishment Clause prohibits attempts to alleviate religious burdens arising from societal disadvantage because to do so would impermissibly elevate religion to a preferred position vis-a-vis the State.<sup>174</sup>

With the exception of some individual justices, no majority opinion of the Supreme Court has ever adopted an absolute stance of neutrality. Virtually all would acknowledge that in some cases free exercise compels, or at least permits, some sort of religious accommodation, either in the form of exemption or even through affirmative action.<sup>175</sup> And when it does, it overrides sub silentio Establishment Clause concerns.<sup>176</sup> Moreover, the Court has intimated that even accommodations not constitutionally required by the Free Exercise Clause may nevertheless not be violative of the Establishment Clause.<sup>177</sup> As one moves further away from an absolutist position, however, line drawing becomes progressively more difficult. To make matters even more confusing, the establishment and free exercise cases are analyzed by the Supreme Court under two different tests with little recognition that both issues are simply mirror images of each other.<sup>178</sup>

*a. The Establishment Clause.*—In *Lemon v. Kurtzman*,<sup>179</sup> the Supreme Court construed the Establishment Clause to require that

*Schools*, 56 CAL. L. REV. 260 (1969); Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 CAL. L. REV. 5 (1977).

174. See Rostain, *supra* note 167, at 1147.

175. See *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

176. See Rostain, *supra* note 167, at 1150 n.19.

177. See, e.g., *Employment Div., Dep't of Human Resources v. Smith (Smith II)*, 494 U.S. 872, 890 (1990) (indicating that a state or federal legislature may create exemptions to accommodate individuals whose religious beliefs would not allow them to comply with a generally applicable law).

178. A notable exception has been Justice O'Connor, who has pointed out that when evaluating whether legislation that benefits religion is violative of the Establishment Clause, a key question should be the extent to which it furthers free exercise by removing government imposed burdens on religion. See *Wallace v. Jaffree*, 472 U.S. 38, 82-84 (1985) (O'Connor, J., concurring) (arguing to invalidate moment of silence statute for public schools in Alabama). The Establishment Clause cannot be properly applied without taking into account the concerns and values of free exercise. See *id.*; *infra* Subpart III.B.1.

179. 403 U.S. 602 (1971). Although *Lemon* is still applied in Establishment Clause cases, there is doubt as to its continuing validity. See *infra* Subpart V.B.

any law or judicial order have a secular purpose, have a primary effect that neither advances nor inhibits religion, and not lead to excessive governmental entanglement with religion.<sup>180</sup> While the meaning and application of these standards is at best uncertain and wavering,<sup>181</sup> they do appear to support the enforceability of agreements to give a *get*. Whether they would similarly permit implication of such an obligation from the terms of the *ketubah*, however, may be another matter.

Courts have already recognized that Jewish law is in essence a total legal system rather than a collection of religious dogma.<sup>182</sup> Thus, *halacha* is classically divided into commandments "between man and God" and commandments "between man and man."<sup>183</sup> Some courts have enforced *get* agreements on the somewhat tenuous ground that because the *get* affects the relationship between husband and wife, the rule requiring a *get* is in itself nothing more than secular law.<sup>184</sup> Characterizing as secular the presence of impediments to remarriage that arise solely because a spouse subscribes to a certain set of religious beliefs seems forced.<sup>185</sup> In fact, from the standpoint of Judaism itself, there is no such distinction between "secular" and "religious" components of the law because the obligatory nature of both ultimately derives from Divine revelation and belief in the authenticity of Mosaic law and Rabbinical interpretation. Judaic law is "secular" only in the very limited sense

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180. *Id.* at 612-13. For a more thorough discussion of the *Lemon* test in the context of its application to a particular statute, see *infra* Subparts III.B.2; III.B.3.

181. See *Wallace v. Jaffree*, 472 U.S. 38, 108-12 (1985) (Rehnquist, J., dissenting); Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 826-31 (1984); David F. Schwartz, *Larkin v. Grendel's Den, Inc.: The Burger Court and the Establishment Problem*, 21 HOUS. L. REV. 179 (1984).

182. See, e.g., *Minkin v. Minkin*, 434 A.2d 665, 668 (N.J. Super. Ct. Ch. Div. 1981); *supra* text accompanying notes 129-131.

183. See *BABYLONIAN TALMUD*, *supra* note 4, YOMA, at 85b.

184. This was the stated rationale in *Stern v. Stern*, 5 Fam. L. Rep. (BNA) 2810 (N.Y. Sup. Ct. Aug. 7, 1979); see *supra* text accompanying notes 124-128; see also *In re Marriage of Goldman*, 554 N.E.2d 1016, 1020 (Ill. App. 1990), *appeal denied*, 555 N.E.2d 376 (Ill. 1990) (quoting Rabbis Schwartz and Rackman: "Marriage and divorce are secular, contractual undertakings"); *supra* text accompanying notes 140-150.

185. Another problem is that if the Jewish laws governing marriage and divorce are nothing more than secular laws, they should be totally preempted by the forum state's own laws governing marital dissolution. See EUGENE SCOLES & PETER HAY, *CONFLICT OF LAWS* § 15.4, at 475 (1982). After all, if parties in Maryland were to contract that the dissolution of their marriage was to be governed by the laws of Missouri, it is clear that their agreement would have no legal effect in Maryland. See *id.* There is no particular reason why the "secular" law of a religious denomination should be accorded any greater deference. If anything, the Establishment Clause cuts the other way. See *Lemon v. Kurtzman*, 403 U.S. 602, 618-19 (1971).

that it deals with many of the subjects that are commonly dealt with under nonreligious systems such as contracts, torts, and agency, and thus bears aspects of similarity that could facilitate comparative analysis. The real question is not how Judaism within its own internal value system characterizes a given law or proceeding, but whether enforcement of that law serves a legitimate secular purpose as defined by the secular institutions whose assistance is being enlisted. In short, whether a law serves a "religious" or "secular" purpose must be answered exclusively by secular law standards and definitions.

Examined in this context, it would appear that agreements to execute a *get* may indeed be enforceable. The purpose of such enforcement, from the perspective of the judicial system, is secular. Indeed, for purposes of applying the first factor in *Lemon*, one may identify three distinct secular purposes. First, the state has a legitimate interest both in assuring adherence to contracts and in affording remedies to those aggrieved by a breach. The fact that the contract itself is concerned with a ceremony that coincidentally has religious significance to one or both of the parties is immaterial. In the absence of unconscionability or other public policy restraints, the parties may agree to do whatever they want. Indeed, it could be argued that a refusal to enforce such a contract on the grounds that its content is "religious" constitutes a denial of both free exercise and equal protection.

Second, the state has a legitimate secular interest in enabling its citizens to remarry following a decree of dissolution, and in facilitating the removal of barriers that prevent the exercise of this fundamental right. As will be discussed, this interest has furnished the basis for various legislative attempts to ameliorate the plight of the *agunah* even in the absence of a prenuptial agreement.<sup>186</sup> At the very least, this interest should enable such agreements to be enforced. Enforcing such agreements encourages marriage, stabilizes family life, and protects fundamental rights of privacy and association.

Third, a deliberate refusal to deliver a *get* knowing that the other will be unable to remarry may often constitute intentional infliction of emotional distress. Whether that factor alone would justify state intervention in the form of a tort remedy will be discussed

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186. See *infra* Part III.

below.<sup>187</sup> Suffice it to say, however, that the fact that religion happens to be the source of the divorcée's belief that she needs a *get* is irrelevant. It is well established that taking knowing advantage of even the irrational or delusional fears of another may be actionable in tort,<sup>188</sup> and religious beliefs should certainly not be on an inferior footing. By the same token, where one party in the context of an intimate, confidential relationship has created legitimate expectations that he will not behave in a manner calculated to cause pain or distress to the other, the state has a legitimate interest in compelling him to live up to that expectation. This is essentially the same interest it has in protecting any of its citizens from emotional or dignitary harms.

In addressing the second prong of *Lemon*, whether enforcement of such agreements has the primary effect of advancing or inhibiting religion, consider the following example:<sup>189</sup> *A* and *B* enter into an agreement in which *A* agrees to observe the Sabbath in exchange for a payment of \$100 by *B*. If *A* reneges on his deal, can *B* bring an action for damages or specific performance? Although the ostensible purpose of state enforcement is secular—promotion of freedom of contract as a facilitator of social exchange and protection of reasonable expectations—it is fairly certain that awarding damages or specific performance would indeed constitute an impermissible establishment of religion because the invariable effect of enforceability (even if not the state's purpose) would be the promotion of a religious ritual or observance.<sup>190</sup>

An agreement to give a *get*, however, stands on a different footing. While it would be inaccurate to characterize a *get* as "secular" in the same way as a divorce decree, it does not require a profession of faith or any act of homage to a Deity, nor does it even necessitate the personal participation of the spouses.<sup>191</sup> The only "effect" of a *get* is that recipients who were formerly prohibited from remarrying within their faiths are now permitted to do so. As such, the effect of

187. See *infra* Part IV; see also Barbara J. Redman, *Jewish Divorce: What Can Be Done in Secular Courts to Aid the Jewish Woman?*, 19 GA. L. REV. 389 (1985).

188. See, e.g., *Alcorn v. Anbro Engineering, Inc.*, 468 P.2d 216 (Cal. 1970); RESTATEMENT (SECOND) OF TORTS, *supra* note 84, § 46, cmt. f, illus. 9-10.

189. The example, with some modifications, is borrowed from Steven F. Friedell, *The First Amendment and Jewish Divorce: A Comment on Stern v. Stern*, 18 J. FAM. L. 525, 530 (1980).

190. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-10, at 1214 (2d ed. 1988).

191. See *supra* text accompanying note 29.

enforcing *get* agreements is not a promotion or endorsement<sup>192</sup> of a particular set of beliefs or practices, but a removal of the societal disabilities and impediments to remarriage that women who subscribe to such beliefs would otherwise suffer. Equalizing the post-dissolution status of women who hold Orthodox Jewish beliefs with the status of women who do not puts all persons on an equal footing by removing these impediments.

The third factor considered in *Lemon*, excessive entanglement, regardless of purpose or primary effect, poses a bit more difficulty. Often described as the most basic and fundamental element in *Lemon*'s tripartite test,<sup>193</sup> it has been sharply criticized as "superfluous."<sup>194</sup> Nevertheless, the "entanglement" criterion remains very much alive.<sup>195</sup>

The "excessive entanglement" criterion has been used in two types of cases. The first involves legislative or administrative programs that necessitate continual monitoring and interchange between governmental authorities and religious institutions.<sup>196</sup> The two-fold dangers present here include governmental meddling with the internal operations of religious institutions and the inadvertent imprimatur of approval that such involvement may suggest to an outsider. The second category involves cases where courts are called upon to decide questions of religious practice or doctrine that are beyond its competence.<sup>197</sup>

A court order directing specific performance of a single act that typically takes less than an hour certainly does not constitute the type of "excessive entanglement" that the Supreme Court has condemned, nor, in the abstract, does it require any court to consider complex areas of Jewish law.<sup>198</sup> Here, however, the second concern of entanglement may lead to a distinction between express agree-

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192. See *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) (advocating the use of an "endorsement" test in analyzing Establishment Clause cases).

193. See, e.g., *TRIBE*, *supra* note 190, at 865.

194. See *Roemer v. Maryland Pub. Works Bd.*, 426 U.S. 736, 768 (1976) (White, J., concurring) ("As long as there is a secular legislative purpose, and as long as the primary effect of the legislation is neither to advance nor inhibit religion, I see no reason . . . to take the constitutional inquiry further.").

195. See, e.g., *County of Alleghany v. ACLU*, 492 U.S. 573, 621 (1989) (acknowledging use of entanglement criterion to address issues surrounding governmental display of religious symbols); *Hernandez v. Commissioner*, 490 U.S. 680, 695-97 (1989) (applying entanglement criterion to hold payments made to Church of Scientology for "auditing" sessions not deductible as charitable contribution under the Internal Revenue Code).

196. E.g., *Lemon v. Kurtzman*, 403 U.S. 602, 607-11 (1971).

197. E.g., *Jones v. Wolf*, 443 U.S. 595 (1979).

198. See *supra* notes 97-98 and accompanying text.

ments and agreements implied from documents such as the *ketubah*. To predicate an obligation to give a *get* on a generalized commitment to effect a marriage in "accordance with the laws of Moses and Israel" requires the court to engage in sustained investigation as to what the "laws of Moses and Israel" are and what they require. Among some of the questions to be considered are the following: What is the *halachic* meaning of the vague incantation—"in accordance with the laws of Moses and Israel"? Is it intended to have any legally binding significance? What are the grounds under which a husband is *obligated* to divorce his wife? What methods of compulsion are authorized? And from the standpoint of Jewish law, what actions may a court take in inducing a recalcitrant spouse to act in accordance with his or her obligation without producing a *get meusah*?

Each of these issues is a subject of controversy within the Orthodox camp and is addressed in voluminous *halachic* literature of hundreds of volumes spanning thousands of years. When one adds the input of other denominations, it is apparent that a true resolution of the scope of the obligation of the *ketubah* is precisely the type of issue that civil courts should not be called upon to resolve. The complexity of this type of determination does not seem to have been appreciated by the courts that summarily decided these matters. While enforcement of a specific nonliturgical undertaking should be allowed even where it is an act of religious significance, courts should avoid inferring and enforcing agreements based on nothing more than generalized commitments to obey Jewish law.

*b. Free Exercise.*—Spouses unwilling to grant a *get* have also argued that any judgment ordering them to give or receive a *get*, at a religious ceremony, conflicts with their free exercise rights.<sup>199</sup> While this argument is occasionally accepted, for the most part free exercise guarantees should not preclude enforcement. One can suggest four possible reasons that support this conclusion. First, civil enforcement is predicated on an express or implied contract that presupposes freely given consent. Compelling a party to do nothing more than what that party has already promised hardly offends the spirit of individual autonomy that lies at the root of the First Amendment.<sup>200</sup>

199. See *supra* notes 90-91 and accompanying text. See also Tribe, *supra* note 190, § 12-19, at 841. The free exercise analysis presented here is made in passing and is further developed *infra* Part V.

200. See also TRIBE, *supra* note 190, § 14-3, at 1158-66 (discussing voluntarism and

Second, in many cases a refusal to participate in the *get* ceremony has nothing to do with either religious belief or moral principle, but is motivated by either malice or attempted blackmail.<sup>201</sup> Admittedly, this methodology is somewhat risky because it necessitates an inquiry into the sincerity of belief and leads into the morass of defining "religion" for purposes of the First Amendment. It is obvious, however, that at least in some cases this does not pose any great difficulty.<sup>202</sup>

Third, because the *get* is not a liturgical activity that involves worship, a profession of faith, or acknowledgement of a Deity, it is secular rather than religious in character and does not constitute an infringement on religion.<sup>203</sup> Indeed, even those parties who do not

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separation as primary values). In theory, this might mean that the Free Exercise Clause never bars enforcement of a contract against a consenting party, regardless of the religious nature of the undertaking. Insofar as the Free Exercise Clause is concerned, therefore, even a contract to pray or to eat Kosher might be enforceable. To the extent, however, that the promised activity is overtly religious, the agreement could not be enforced because of establishment concerns, particularly under the "primary effect" test. As noted earlier, *get* agreements do not implicate the Establishment Clause. See *supra* notes 179-198 and accompanying text.

201. Thus, the court in *Burns v. Burns*, 538 A.2d 438 (N.J. Super. Ct. Ch. Div. 1987), refused to recognize a free exercise claim where the evidence showed that the husband was willing to give a *get* if the price was right. See *id.* at 400; *supra* text accompanying notes 132-136.

202. See *In re Marriage of Goldman*, 554 N.E.2d 1016, 1021 (Ill. App. 1990), *appeal denied*, 555 N.E.2d 376 (Ill. 1990) (dealing with a husband's free exercise claim by finding that his "intense dislike for Orthodox Judaism . . . did not rise to the level of a religious belief"). To the extent the *Goldman* court holds that the individual's belief system must somehow constitute a "formal religion" to be protected, the holding appears incorrect. It is well established that honestly held religious beliefs are entitled to free exercise protections, even if the claimant is not a member of an established religion and has views that are at odds with his own church. See, e.g., *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Frazee v. Illinois Dep't of Employment Security*, 489 U.S. 829 (1989). Indeed, it is possible that even an atheist may be able to invoke the Free Exercise Clause though the Supreme Court has never squarely addressed the issue. See *Wallace v. Jaffree*, 472 U.S. 38, 52-54 (1975) (stating in dicta that "the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all"). Indeed, simple logic should dictate that just as a Jew could not be compelled to participate in a Christian ceremony, neither should an atheist be compelled to participate in a Jewish one.

Because of these considerations, I find *Goldman* a much more difficult case than *Burns*. In *Burns*, the husband was clearly playing the extortionist, while in *Goldman* there was at least some evidence of ideological opposition to the institution of a *get*. Compare *Burns*, 538 A.2d at 440-41, with *Goldman*, 554 N.E.2d at 1021. While the trial court was free to disbelieve the husband's contentions in *Goldman*—after all, he had given a *get* to his first wife—it seems problematic that the judge can believe him nonetheless and hold that such ideas do not rise to the level of constitutional protection.

203. A number of courts have in fact characterized the *get* as a secular, rather than religious document. See, e.g., *Stern v. Stern*, 5 Fam. L. Rep. (BNA) 2810 (N.Y. Sup. Ct. Aug. 7, 1979). Admittedly, however, this line of argument standing alone is hardly com-



believe in the institution of *get* merely consider it superfluous. They rarely have an ideological or theological belief that is offended by their participation. Rarely, if ever, does recalcitrance have a principled, religious basis.

A final rationale is a bit more complex. The Free Exercise Clause does not exempt a party from undoing the harms caused to another by the very religious restrictions that the party himself invoked, but now repudiates. Agreeing to a religious ceremony imposes from the standpoint of *halacha* certain disabilities and restrictions on remarriage. It would be inequitable to invoke free exercise as a protective, exonerating shield against the very harms that the party had previously created. Just as the First Amendment cannot be used as a defense to acts that are otherwise criminal or tortious,<sup>204</sup> so too it cannot be employed as a device for the erection or maintenance of barriers against the exercise of another's fundamental freedoms.

4. *Halachic Problems.*—Civil enforcement of an agreement to give a *get*, whether express or implied from the terms of the *ketubah*, while undoubtedly motivated by benign intentions, may ultimately be a self-defeating proposition. Under Jewish law, a *get* executed under duress or compulsion, which includes the order of a non-rabbinical court, is invalid. The recipient of such a document is still *halachically* unable to remarry<sup>205</sup> and any children born from a subsequent, illicit union will be tainted with the heavy stigma of *mamzeirus*.<sup>206</sup> Although the basis of enforceability is ultimately traceable to an agreement, the consensus of authority is that even self-imposed duress precludes execution of a *get*, particularly when such

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elling. I have previously argued that because both the need for, and effectiveness of, a *get* stem from the same unitary *halachic*-religious system that is the source of all religious beliefs of Judaism (i.e., Divine revelation), the execution of a *get* should not be regarded as "secular" for the purpose of the Establishment Clause. The mere fact that the *get* is nondevotional in nature would not in itself be sufficient to sustain a *get* agreement from attacks based on establishment, unless it could be established that enforcement of such covenants serves distinct secular purposes (which indeed it has). Nevertheless, the nontheistic nature of the ceremony, while perhaps immaterial with respect to Establishment Clause concerns which focus on state endorsement and entanglement, may be highly relevant on the issue of free exercise, which above all is designed to protect infringements on religious conscience.

204. See, e.g., *Reynolds v. United States*, 98 U.S. 145 (1878). For a more recent treatment, see *Employment Div., Dep't of Human Resources v. Smith (Smith II)*, 494 U.S. 872 (1990).

205. See *supra* Subpart I.D.

206. See *supra* note 48.

duress could culminate in high fines, and even incarceration,<sup>207</sup> well beyond the scope of the sanction voluntarily chosen.

One possible way around this problem is for a court to structure its judgment not as a directive to give a *get*, but rather as an order to submit to the jurisdiction of the rabbinical court, leaving to that court the issue of whether or not the *get* should be executed. This was the procedure followed in *Burns v. Burns*,<sup>208</sup> and it successfully avoids *halachic* questions. The difficulty with this approach, however, is that it imposes an obligation that does not follow the actual language of the agreement (which promises to give a *get*), and that language cannot be readily implied from the terms of the *ketubah*. In addition, getting the parties to go to the *bais din* is little guarantee that they will obey the decision of the *bais din* once it is rendered.<sup>209</sup>

The foregoing conclusion—that judicial enforcement of *get* covenants may result in an invalid *get*—is subject to one major qualification. An important distinction must be drawn between judicially ordering affirmative relief against a recalcitrant spouse based on a promise to grant a *get* and denying that spouse relief when he or she seeks benefits under a separation agreement. A negotiated separation agreement designating the allocation of marital assets may provide that a spouse's entitlements are conditional on the execution of a religious divorce. Failure to comply with that condition would bar any attempt by the violator to enforce judicially the terms of the agreement, even in those jurisdictions that would not directly order the execution of a *get*. To the extent that a spouse is "pressured" to grant a *get* in order to secure additional benefits under a separation agreement, the resulting divorce would not be a *get meusah*, because *halacha* recognizes a clear distinction between acting to avoid physical or financial harm (where the rules of *get meusah* apply) and acting to obtain benefits (where they do not).<sup>210</sup>

This is true, however, only if the agreement provides a complying spouse with more benefits than he or she would receive under

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207. See *In re Morris & Morris*, 42 D.L.R.3d 550, 574-75 (Matas, J., concurring) (discussing the anomaly of a *get* being invalid precisely because a court ordered that it be given); *Margulies v. Margulies*, 344 N.Y.S.2d 482, 485 (N.Y. App. Div. 1973), *appeal dismissed*, 307 N.E.2d 562 (N.Y. 1973) (Nunez, J., dissenting); see also H. Patrick Glenn, *Where Heavens Meet: The Compelling of Religious Divorces*, 28 AM. J. COMP. L. 1, 21 (1980) ("[W]here it is clear that such recognition would not be forthcoming civil courts should naturally not engage in a pointless exercise . . .").

208. 538 A.2d 438, 440-41 (N.J. Super. Ct. Ch. Div. 1987).

209. See *supra* text accompanying notes 68-69.

210. See *supra* notes 84-88 and accompanying text.

the jurisdiction's law of equitable distribution absent express agreement and, conversely, where failure to grant a *get* leaves the recalcitrant party in no worse a position. To the extent that failure to execute a *get* leaves the violator with *less* than he otherwise would have had under state law, such an agreement appears indistinguishable from any other self-imposed penalty clause, and the execution of a *get* under such circumstances would appear to be improper.

The key problem in the prenuptial agreement, therefore, is *halachic* rather than secular in nature, and there is little the current legal system can do to resolve it.

*B. Express or Implied Promises to Submit to Rabbinic Jurisdiction*

In 1954, Professor Saul Lieberman of the Jewish Theological Seminary (Conservative) proposed that a new clause be added to the *ketubah*.<sup>211</sup> The clause provided that in the event of marital difficulty, the couple would recognize the authority of the *bais din* of the Rabbinical Assembly of the Jewish Theological Seminary to "counsel them in the light of Jewish tradition," to "summon either party at the request of the other," and to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decision.<sup>212</sup> The Rabbinical Assembly quickly approved this addendum, although the change has not found favor with the Orthodox rabbinate—particularly the clause that stipulates a penalty.<sup>213</sup>

The theory behind the clause is that even if there are *halachic* or constitutional impediments in judicially compelling parties to give or receive a *get*, those concerns would not apply where parties are ordered to submit to the jurisdiction of a freely chosen rabbinic tribunal. Such an agreement is no different in kind than any other agreement to submit disputes to binding arbitration, which may be specifically enforced absent fraud or duress. Nor would sanctions imposed to force someone to go to a *bais din* constitute compulsion that would invalidate the *get* from the standpoint of *halacha*.

The test of the clause's legal enforceability arose in the celebrated case of *Avitzur v. Avitzur*,<sup>214</sup> the only case to date in which a

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211. See ISAAC KLEIN, A GUIDE TO JEWISH RELIGIOUS PRACTICE 293 (1979).

212. See *id.* for a discussion of the proposal from the perspective of the Conservative movement.

213. For criticism of the Lieberman proposal, see Norman Lamm, *Recent Additions to the Ketubah*, 2 TRADITION 93 (1959); A. LEO LEVIN & MEYER KRAMER, NEW PROVISIONS IN THE KETUBAH (1955).

214. 446 N.E.2d 136 (N.Y. 1983), *rev'g* 449 N.Y.S.2d 83 (N.Y. App. Div. 1982), *cert.*

state's highest court has addressed the validity of prenuptial agreements associated with religious divorces. Boaz and Susan Avitzur were married in a religious ceremony on May 22, 1966.<sup>215</sup> They signed a *ketubah* that contained Lieberman's suggested clause.<sup>216</sup> A civil divorce was granted to Boaz in 1978.<sup>217</sup> In 1980, Susan, who had not yet received a *get*, brought an action for specific performance to compel Boaz to appear before a Rabbinical tribunal to initiate the *get* process.<sup>218</sup> Boaz filed a motion to dismiss on the ground that enforcement of such an agreement constituted an impermissible and excessive entanglement in religion and violated his own free exercise rights.<sup>219</sup> The Special Term denied the motion, but the Appellate Division reversed, though not wholly on Boaz's grounds.<sup>220</sup> In a four to one decision, the Appellate Division held that because the agreement was entered into as part of a religious ceremony and was "liturgical" in nature, there was no legitimate secular interest that would warrant its enforcement. As far as the state was concerned, the marital bond was already dissolved.<sup>221</sup> Noting that a number of New York cases have enforced a *get* promise, the court pointed out that in virtually all of these cases the provision was incorporated in a civil agreement with no reliance placed on the *ketubah* itself.<sup>222</sup>

The New York Court of Appeals, in a four to three decision, reversed the Appellate Division and ruled that the Lieberman clause was enforceable and that Susan's action for specific performance should be allowed to proceed.<sup>223</sup> Writing for the court, Judge Wachtler stated that there was nothing in law or public policy to prevent judicial recognition and enforcement of the secular terms of

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denied, 464 U.S. 817 (1983). Two excellent articles exploring the implications of *Avitzur* are Linda S. Kahan, *Jewish Divorce and Secular Courts: The Promise of Avitzur*, 73 GEO. L.J. 193 (1984), and Elizabeth R. Lieberman, *Avitzur v. Avitzur: The Constitutional Implications of Judicially Enforcing Religious Agreements*, 33 CATH. U. L. REV. 219 (1983).

215. *Avitzur*, 446 N.E.2d at 137.

216. *Id.*

217. *Id.*

218. *Avitzur*, 449 N.Y.S.2d at 84.

219. *Avitzur*, 446 N.E.2d at 137.

220. *See id.*

221. *Avitzur*, 449 N.Y.S.2d at 84.

222. *Id.*; *see* Koepfel v. Koepfel, 161 N.Y.S.2d 694 (N.Y. App. Div. 1957); Waxstein v. Waxstein, 395 N.Y.S.2d 877 (N.Y. Sup. Ct. 1976); Rubin v. Rubin, 348 N.Y.S.2d 61 (N.Y. Fam. Ct. 1973); *supra* notes 90-123 and accompanying text. The only exception was Stern v. Stern, 5 Fam. L. Rep. (BNA) 2810 (N.Y. Sup. Ct. Aug. 7, 1979), a trial judge's opinion, of which the Appellate Division specifically disapproved in *Avitzur*. *See* 449 N.Y.S.2d at 84.

223. *See Avitzur*, 446 N.E.2d at 139.

the *ketubah* (though it was a question of fact whether there was actual contractual intent).<sup>224</sup> Characterizing the Lieberman clause as closely analogous to a typical arbitration agreement, the court concluded that the religious context in which the *ketubah* was executed should not deprive it of the same dignity and deference accorded to any other civil contract, as long as its enforcement violated neither the law nor public policy of the state.<sup>225</sup> While the Establishment Clause precludes judicial resolution of questions pertaining to religious law, this type of clause could be enforced "solely upon the application of neutral principles of contract law" without entanglement in doctrinal or liturgical questions.<sup>226</sup>

*Avitzur* is a significant victory for those who seek the help of the legal system to alleviate the *agunah*'s plight. Indeed, even the Orthodox rabbinate who find the Lieberman clause unacceptable could easily draft a *halachically* valid substitute that would be equally enforceable.<sup>227</sup> The extent of *Avitzur*'s significance, however, should not be over-exaggerated. The analysis is a bit flawed, or at least incomplete, and in a four to three decision, there are distinct possibilities of future reversal on the state or even the federal level.

Furthermore, the court's reliance on the so-called "neutral principles of contract law" proves too much. The same analogy could be made about an agreement to pray or observe the Sabbath, yet it is inconceivable that any court of law would compel a person to perform an "act of Divine worship" merely because he promised

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224. *See id.* at 138-39.

225. *See id.* at 138.

226. *Id.* Although there was a vigorous three-member dissent, it is uncertain whether their objection was based on the fact that: (1) the *ketubah* is a religious, rather than secular document; (2) the obligations of the Lieberman clause are not self-explanatory and would in fact necessitate in-depth examination of Jewish religious law and doctrine; (3) the parties lacked true contractual consent; (4) the very notion of ordering someone to submit to an ecclesiastical authority even under the guise of neutral contract enforcement is offensive to the First Amendment (a proposition that would cast serious doubt on a whole group of New York cases, not just *Stern*); or (5) after dissolution, the state no longer has a legitimate interest in the defunct marital relationship. *See id.* at 139-42 (Jones, J., dissenting).

227. From the Orthodox perspective, there are two problems with the Lieberman proposal: it designates a particular *bais din* that the Orthodox movement considers invalid, and it stipulates an indeterminate monetary penalty that runs afoul of the principle of *asmakhta*. *Asmakhta* is the *halachic* principle holding that monetary agreements whose indefiniteness leads only to vague, contingent, or indeterminate commitments do not give rise to *halachically* binding obligations. Both of these problems can be eliminated by drafting an agreement that designates an Orthodox *bais din* and deletes any reference to financial penalties. For an agreement drafted along these lines, see J. David Bleich, *A Suggested Antenuptial Agreement: A Proposal in the Wake of Avitzur*, J. OF HALACHA & CONTEMP. SOC'Y, Spring 1984, at 25, 38-39.

to do so. A possible demarcation point may lie in the difficulties of enforcement. While ordering someone to pray may indeed not be violative of free exercise because the person had agreed to do so, a court would be unable to determine compliance with its order (and impose follow-up sanctions) without extensive involvement in religious doctrine. As such, issuing an order that entails in-depth doctrinal inquiry "excessively entangles" the judiciary in religious law, a violation of the Establishment Clause. By contrast, the court may have thought that ordering parties to submit their disputes to a *bais din* does not necessitate such an inquiry. Alternatively, the court may have reasoned that while prayer and Sabbath observance are "religious acts," going to a *bais din* is not.

Both of these distinctions are open to question. It is true that no court should issue an order that it will not subsequently be able to enforce without excessive involvement in the resolution of religious doctrine. Such difficulties, however, may be equally present under the Lieberman clause. Assume that the court directs the parties to respond to the summons of the *bais din* by treating the *ketubah* as an arbitration agreement. Assume further that at a later point in time, Susan files a motion to have Boaz declared in contempt for failure to appear. The trial court will then presumably issue a notice to show cause why Boaz should not be held in contempt. At any later contempt hearing, a number of issues can be raised: the meaning of "responding" to a summons (personal appearance or through writing), the necessary content of such a response, evidentiary standards, or allegations of disqualification due to bias. Presumably, because the parties agreed to a *bais din*, these matters would be determined by Jewish law, and yet the court, in the exercise of its contempt function, would have to consider them. If, in lieu of *halacha*, the court applies secular standards in judging the propriety of the internal procedures of a Rabbinical court, the interference and entanglement with religious institutions are even greater. While ordering the parties to "respond" to the summons of a *bais din* may not in itself be an "establishment of religion," the follow-up enforcement procedures may well raise severe constitutional conflicts. There is little sense in issuing orders that the court may not constitutionally be able to enforce.<sup>228</sup>

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228. The notion that at least some arbitration agreements invite excessive entanglements with religion underlies an earlier case, *Pal v. Pal*, 356 N.Y.S.2d 672 (N.Y. App. Div. 1974). In *Pal*, a husband had obtained a civil divorce from his wife. *Id.* at 672. In an open-court stipulation later incorporated into the judgment of divorce, the parties agreed to submit to a rabbinical tribunal on the question of whether the husband should

The assumption that responding to the summons of an ecclesiastical court is not a "religious" act is equally questionable on free exercise grounds. Submitting to the authority of a tribunal is a tacit declaration that the tribunal is empowered to resolve particular matters. If the source of the tribunal's empowerment is a religious law, it follows that submission to its authority is an acknowledgement of the binding force of the religion. At least on one level, then, while no act of overt worship is required, enforcement of rabbinical arbitration clauses touches at least the periphery of free exercise concerns.

On balance, however, I do not disagree with the court's holding in *Avitzur*. Certainly, the fact that an otherwise enforceable agreement appears in a document commonly associated with a religious ceremony should be of no constitutional significance, though it may go to the issue of contractual intent, a question not susceptible to summary resolution. As far as the First Amendment is concerned, the substance rather than the form of the undertaking should be controlling. Moreover, as noted earlier in connection with *get* agreements, there are a number of arguments that can be made to sustain the constitutionality of enforcing a Lieberman-type *ketubah*. Nevertheless, by placing primary reliance on "neutral principles of contract law," the court in *Avitzur* failed to explore, and thereby address, the establishment and free exercise concerns that may be adversely affected. As is evident from the case of the person who contracts to pray, it is just not true that as long as the court orders a person to do no more than he promised, there are no constitutional difficulties. In enforcing undertakings that have some religious

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initiate the *get* process and abide by a Lieberman-like clause. *Id.* at 672-73. The agreement did not specify a particular *bais din*, but stated that the tribunal would be chosen by each of the parties designating a rabbi of their choice and the two rabbis then choosing a third—a well-recognized *halachic* alternative. *Id.* at 672; see SHULCHAN ARUCH, *supra* note 15, HOSHEN MISHPAT 13:1. The stipulation further provided that if either of the parties failed to choose a rabbi within one week or if the two rabbis failed timely to choose the third, the court would select a competent rabbi as the third member. *Pal*, 356 N.Y.S.2d at 673 (Martuscello, J., dissenting). A *bais din* was initially assembled without the aid of a court, but the husband's designated rabbi later withdrew. *Id.* Upon the wife's application, the Special Term designated the "neutral" member as the husband's representative and directed the two to choose a third. *Id.* at 672-74. This order was reversed by the court's summary holding that the Special Term had no authority to convene a Rabbinical tribunal. See *id.* at 673.

While *Avitzur* makes no reference to *Pal*, in all probability *Pal* continues to be good law. Allowing a court to enforce a rabbinical arbitration agreement is a far cry from giving the court the authority, even in cases of deadlock, to determine a *bais din's* composition. Nevertheless, the same entanglement concerns that justify reversal of the trial court's decision in *Pal* apply, at least in some degree, to *Avitzur*.

overtones, it is not enough to ask whether the parties agreed. A comprehensive approach necessitates the examination of a number of factors: the substance of the agreement; the level of potential entanglement in religious doctrine, both in the formulation of the order and in follow-up enforcement measures; possible intrusions into religious autonomy and self-governance; the appearance of according religious institutions or religious law favorable, preferred status; and infringements of religious liberty. While contractarian analysis is one useful strand in formulating criteria for enforcement, these other factors must be considered as well. As noted, compelling submission of disputes to a *bais din* implicates concerns of both entanglement and autonomy, neither of which the *Avitzur* court fully addresses. As an exposition of constitutional law, the *Avitzur* opinion leaves much to be desired.<sup>229</sup>

A second observation is that the *Avitzur* case fails to address the monetary penalties aspect of the Conservative *ketubah*. Assume, for example, that one party refuses to appear after being summoned and the *bais din* imposes a monetary fine. If we accept the analogy to arbitration agreements, in all probability the fine would not be recoverable in a court of law. Arbitrators are normally not authorized to impose their own penalties for failure to submit to their jurisdiction or to obey their rulings.<sup>230</sup> Nor can the parties agree in advance to the payment of such penalties under basic principles of contract law. The exclusive remedy for breach of a contract to arbitrate is an action for specific performance, which in turn would be enforceable by imprisonment or fines to be determined by a court of law. It is the judiciary, therefore, rather than the *bais din*, that determines the ultimate penalties for noncompliance.

A crucial question raised by *Avitzur* is where we go from here. Technically, *Avitzur* only requires the parties to respond to the summons of a *bais din*.<sup>231</sup> Presumably, if a party fails to respond, the court may then impose sanctions for civil contempt. Responding to

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229. The court was preoccupied with dispelling the notion that the *ketubah* was a "liturgical" document, whose terms were not enforceable in civil court—the basis for the Appellate Division's decision. See *Avitzur v. Avitzur*, 446 N.E.2d 136, 138-39 (N.Y. 1983), *rev'g* 449 N.Y.S.2d 83 (App. Div. 1982), *cert. denied*, 464 U.S. 817 (1983). This, however, is a "red herring" argument based on form rather than substance, and is the least significant of the constitutional issues that could be raised. Unfortunately, the terms of the debate were largely set by the Appellate Division's reliance on this formality, which then determined the direction of the appellate court's opinion. See *id.* at 137.

230. See ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1173 (1965); MARTIN DOMKE, COMMERCIAL ARBITRATION § 37.00, at 493 (1984).

231. See *Avitzur*, 446 N.E.2d at 139.



a summons, however, is not the same as carrying out the *bais din*'s order. The *Avitzur* court pointedly left open the question of whether the wife may go back to court and compel compliance with the *bais din*'s decree, if the husband has ignored the *bais din* order to execute the *get*.<sup>232</sup> A number of commentators take the view that *Avitzur* permits nothing more than forcing the parties to appear before the *bais din*, and that the decision would not compel enforcement of either an express agreement to give a *get* or the order of a *bais din* to give a *get* entered after submission of a dispute.<sup>233</sup> They argue that the execution of a *get* is a ceremony of religious significance that no court can directly order.<sup>234</sup> This is probably an overly narrow reading of the court's holding, for several reasons. In the first place, although admittedly *Avitzur* did not directly address the question, there is at least some lower court authority to support the argument that even agreements to execute a *get* may be specifically enforced,<sup>235</sup> at least when such agreements are explicit.

Second, under the court's own contract analysis, as incomplete as it may be, there is no relevant distinction between agreements to give a *get* and agreements to submit to rabbinic arbitration.<sup>236</sup> In both cases, a party is simply being forced to do what he agreed to do. Indeed, mandating appearance before a *bais din* for purposes of dispute resolution on the issue of a *get* may be considerably more invasive than directly ordering the execution of a *get*. A *get* typically can be executed in less than an hour, while a contested proceeding before a *bais din* may take several days and involve numerous inquiries into intimate details of marital life.<sup>237</sup>

Third, because the court characterizes the *bais din* clause as akin to an arbitration agreement, not only will specific performance be granted to compel the parties to submit their dispute to the arbitrator, but the arbitration order may be specifically enforced as well.<sup>238</sup> Thus, insofar as state law is concerned, the same mechanisms that can be employed to bring the parties before the *bais din* may then be utilized to secure the *get*.

Once again, however, as was true with direct agreements to give

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232. See *id.* at 141.

233. See, e.g., NEWSLETTER OF THE AMERICAN JEWISH COMMITTEE, Fall 1983, at 1, 2.

234. *Id.*

235. See *supra* notes 92-150 and accompanying text.

236. See *Avitzur*, 446 N.E.2d at 138-39.

237. For a good informal description of how a *bais din* conducts its examination of the parties, see EPSTEIN, *supra* note 6, at 39-46.

238. See DOMKE, *supra* note 230, § 30.01, at 441. Technically, the court will judicially confirm the arbitration decision, and then order that it be carried out.

*gittin*, serious *halachic* concerns are raised.<sup>239</sup> A *get* issued pursuant to the order of a secular court that provides sanctions for noncompliance is invalid as a *get meusah*, or coerced *get*.<sup>240</sup> There is one major exception to this rule, however. If a secular court does nothing more than compel obedience to the preexisting decision of a rabbinic tribunal, the *get* is valid.<sup>241</sup> On its face, this renders the *Avitzur* approach a seemingly perfect solution to the problem. Compelling the parties to go to a *bais din* certainly raises no *meusah* problem, and enforcing the *bais din*'s order to give a *get* is similarly acceptable under the rule cited above. This makes the *Avitzur* approach far more preferable than the expedient of direct agreement.

Unfortunately, the matter is a bit more complicated and can only be understood in the context of the overall powers of a *bais din* as defined by *halacha*. In an ideal *halachic* system, a *bais din* is able to compel compliance with its orders through a variety of sanctions including fines, imprisonment, corporal punishment, and even threats of execution.<sup>242</sup> The Mishna makes abundantly clear that these general enforcement powers apply to *get* orders as well.<sup>243</sup> The early rabbinic commentators noted that permitting a *bais din* to compel the granting of a *get* is ostensibly inconsistent with the principle that a *get* must be given willingly. These commentators provided a variety of solutions, the most well known of which is suggested by Maimonides.<sup>244</sup> However this inconsistency may be resolved, it is clear that compulsion pursuant to a valid order of a *bais din* does not constitute an invalidating cause.<sup>245</sup>

Upon what grounds a *bais din* can order the execution of a *get* is a matter of great dispute and considerable uncertainty. Certain cases are described as "*kofin*" ("we force"), and certain cases are described as "*yotzee*" ("he must divorce").<sup>246</sup> According to many authorities, the extensive enforcement powers of a *bais din*, including corporal punishment and incarceration, may be employed only in the comparatively few circumstances that are described as *kofin*-type cases.<sup>247</sup> With respect to *yotzee* cases, while the husband is in-

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239. See *supra* notes 205-210 and accompanying text.

240. See *supra* Subpart I.D.

241. See *supra* text accompanying notes 72-79.

242. See, e.g., SHULCHAN ARUCH, *supra* note 15, HOSHEN MISHPAT 11:1, 97:15; *id.*, YORE DE'AH 334:43.

243. BABYLONIAN TALMUD, *supra* note 4, GITTIN, at 88b.

244. See *supra* note 79.

245. See *supra* note 80.

246. For an explanation of the terms, see *supra* note 80.

247. See *supra* note 80.

deed under a religious and moral obligation to give his wife a *get*, and the *bais din* may issue an order directing him to do so, such an order may not be enforced by physical or financial sanctions, but only by moral suasion and appeals to conscience (which, in a *halachic* society, may be considerably more potent than they are today).<sup>248</sup> According to these opinions, any use of force or coercion even for the purpose of enforcing the order of the *bais din* will still render the *get* invalid if the order was only on the level of *yotzee*.<sup>249</sup> The notion of a court issuing an order that cannot be effectively enforced may strike us as strange, but makes perfect sense if we remember that *halachic* judges were also the religious and spiritual leaders of their communities and, as such, could issue directives reflective of moral commitment and aspiration.

Moreover, there is indeed a principle that states that a non-Jewish court may enforce the decision of a Jewish court without invalidating the *get*.<sup>250</sup> This last principle, however, must be read in light of the preceding rules. Where a secular judicial system is acting as the surrogate enforcer for the *bais din*, the scope of permissible coercion that may be employed may not exceed that degree which is permitted to be exercised by the *bais din* itself in an ideal *halachic* world. Assume, for example, that a *bais din* issues an order directing a husband to divorce his wife, but the grounds established would only justify a decree of *yotzee*, rather than *kofin*. In such a case, were the *bais din* itself to fine or imprison the person to compel his compliance, the *get* would be rendered invalid.<sup>251</sup> It is obvious that resorting to secular enforcement would produce the same result.

In short, *Avitzur* is an imperfect solution. Assuming its constitutional validity, it does assure that the parties may be forced to go to a *bais din*.<sup>252</sup> For parties who are religiously indifferent, once they are brought in front of a *bais din*, the *bais din* may in fact be able to exercise moral suasion, or generate community pressure. The determined *get* resister, however, may simply refuse to obey the *bais din*'s order; unless the circumstances would permit the entry of a *kofin* directive, specific performance would be *halachically* impossible.<sup>253</sup>

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248. See *supra* note 81.

249. See *supra* note 80.

250. See BABYLONIAN TALMUD, *supra* note 4, GITTIN, at 88b.

251. See *supra* note 80.

252. See *Avitzur v. Avitzur*, 446 N.E.2d 136, 139 (N.Y. 1983), *rev'g* 449 N.Y.S.2d 83 (App. Div. 1982), *cert. denied*, 464 U.S. 817 (1983).

253. Furthermore, *Avitzur* works only if the parties have executed an agreement to that effect. There has been widespread reluctance to execute this type of prenuptial

The *Avitzur* case can aid the plight of women only in tandem with a *halachic* re-examination of the grounds that permit judicially ordered divorces. A number of studies suggest the possibility of *halachic* expansion,<sup>254</sup> though the authors rarely make clear whether they are expanding the *kofin* category or only the *yotzee* category.<sup>255</sup> If they seek to do the latter, their proposals accomplish very little. It should be noted that this is an area that demands rabbinical consensus; individual courage, resourcefulness, and ingenuity play little or no role. If individual rabbis or *batei din* were to execute *gittin* that were unacceptable to other segments of the religious community, this would create a catastrophe of divisiveness—where Jews who have been divorced in accordance with views of one *bais din* are still deemed *halachically* married according to the views of another *bais din*. As a result, their children and all future issue from a second union would be tainted irrevocably with the status of *mamzer*. Whole segments of religiously observant Jews would be unable to intermarry with each other.<sup>256</sup> As a matter of common sense, no questionable procedure in executing a *get* or in seeking civil enforcement should ever be employed until it achieves broad-based consensus within all segments of the knowledgeable *halachic* community.

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agreement based on the belief that discussing divorce mars the joys of the wedding. Suffice it to say, however, that the *ketubah* itself contains alimony provisions, and as *Ethics of the Fathers* reminds us, "Who is wise? He who anticipates the future." ETHICS OF THE FATHERS 4:1. Couples should be encouraged to sign such agreements; it may avoid much grief later. Nevertheless, *Avitzur* is not a panacea, and a determined *get* resister can always find a way out.

254. The best of these is SHLOMO RISKIN, WOMEN AND JEWISH DIVORCE: THE REBELLIOUS WIFE, THE AGUNAH, AND THE RIGHT OF WOMEN TO INITIATE DIVORCE IN JEWISH LAW: A HALAKHIC SOLUTION (1989). See also HAUT, *supra* note 116. Riskin's conclusions are criticized in two articles: Tzvi Gartner, *Problems of a Forced Get*, J. OF HALACHA & CONTEMP. SOC'Y 118 (1985); Tzvi Gartner, Book Review, JEWISH ACTION, Spring 1990, at 70.

255. Riskin fails to address this issue at all. None of his arguments support expansion of *kofin* orders.

256. To some extent, this has already occurred in the Reform movement, which no longer requires a *get*. See *supra* note 5. As a result, intermarriage between Reform and Orthodox Jews has been curtailed because some marriage, perhaps of a great-grandparent long ago, was not terminated with a *get*, thereby resulting in the children of a second union being labelled illegitimate. This result is especially heartbreaking when a descendant from this union is desirous of joining Orthodoxy and then discovers, to his chagrin, that he bears the stigma of *mamzer*. As a result, many Reform Rabbis counsel their congregants to obtain a *get* to avoid later complications for offspring. There is also a national organization, KAYAMA, based in New York, whose goal is to educate the general Jewish public about the need for a *get* (even for irreligious nonbelievers) and to arrange *gittin* at low cost. See Toby Bulman Katz, *Jewish Divorce and Jewish Unity*, AMIT WOMEN (Jan.-Feb. 1989). Indeed, I am personally aware of KAYAMA arranging a *get* within two hours.

### C. *The Use of Prenuptial Support Agreements*

Another relatively simple device of indirectly encouraging the granting of a *get* is the drafting of a prenuptial support agreement. Under Jewish law, a husband is obligated to provide his wife with support either in kind or in money.<sup>257</sup> Although this general obligation is spelled out in the *ketubah*, it is also *halachically* mandated and exists independent of any written document.<sup>258</sup> Claims for spousal support are enforceable during the life of the marriage based on the *bais din*'s determination of custom, the standards to which the particular woman is accustomed (both pre- and post-marriage), and the cost of living in that particular locale.<sup>259</sup> Once a marriage has been terminated by divorce, however, *halacha* recognizes no continuing support obligations outside of the relatively paltry one time *ketubah* payment of 200 *zuz*<sup>260</sup> and any other additional sums voluntarily assumed. Alimony in the sense of continuing support is an institution unknown to the *halacha*.

In the State of Israel, as part of their broad authority over questions of personal status, rabbinic courts today still have jurisdiction to adjudicate support claims.<sup>261</sup> A common practice employed by these courts when faced with the specter of a recalcitrant husband refusing to give a *get* is to enter a money judgment for an unusually high level of support, sometimes as much as \$250 a day. Because the only way the support obligation can be terminated is through dissolution of the marital bond, this judgment creates significant pressure to execute a *get*.<sup>262</sup>

This approach appears questionable for a number of reasons. First, it is unclear that the imposition of a money judgment has a significant deterrent or channelling effect because of exemption laws, concealment of assets, and like factors. Especially if the judgment is clearly beyond the husband's capacity to pay, it may not

257. SHULCHAN ARUCH, *supra* note 15, EVEN HAEZER 70:1.

258. *Id.*

259. RABBI BEN ZION SHARESHEVSKY, DINAI MISHPACHA [FAMILY LAW IN ISRAEL] 117-25 (2d ed. 1976).

260. *See supra* note 154. The *zuz* was a silver coin that contained approximately 0.2 ounces of pure silver. Two hundred *zuz* today equals the market price of 40 ounces of silver—approximately \$320.

261. *See SHARESHEVSKY, supra* note 259, at 10-15.

262. *See* Getzel Ellinson, *Siruv Latet Get*, 69 SINAI 135 (1971). For earlier precedents utilizing the imposition of support obligations as a mechanism to indirectly compel a *get*, *see* RABBI MEIR POSNER [BAIT MEIR] (19th century Germany), EVEN HAEZER 154:1; RABBI SHMUEL HALEVI, NACHALAT SHIVA 9:14. A more recent endorsement of this approach appears in 2 OTZAR HAPOSKIM, *supra* note 54, at 8-16 (opinions of Chief Rabbis Herzog and Uziel); Tzvi Gartner, *For the Benefit of Agunas*, 16 MORIAH 79 (1988).

carry any weight. Second, because only husbands are responsible for the support of their wives and not vice-versa, the proposal does nothing to alleviate the plight of the small, but significant, number of men who are unable to remarry because of their wives' refusal to accept a *get*.

Most critical of all, there is a distinct possibility that a *get* executed in order to escape an unreasonably exorbitant support obligation would be *halachically* invalid as a *get meusah*. An inordinately high support obligation not based on need, prevailing custom, or a prior standard of living appears to be nothing more than a disguised penalty for the nonexecution of a *get*. Although *batei din* do have the authority to impose coercive sanctions, this is true only in specially defined circumstances.<sup>263</sup> When these conditions are not present, even court-imposed penalties render the *get* invalid. While there is considerable disagreement over what those circumstances might be, by definition the "support obligation" theory is utilized when coercion is no longer an *halachically* acceptable option. By taking into account factors that are extraneous to the general determination of support, the support order itself becomes a *de facto* penalty, thereby rendering it *halachically* invalid. This is true especially where the order conditions the amount payable on compliance with a *bais din*, makes specific reference to a *get*, or increases the amount for every week the husband refuses to give a *get*.

Finally, under *halacha*, the husband is entitled to his wife's earnings in exchange for supporting his wife.<sup>264</sup> While the wife has the exclusive option to forego support and elect to keep her earnings,<sup>265</sup> she cannot press a support claim and at the same time hold on to her own money.<sup>266</sup> In effect, then, any support claim asserted by the wife would have to be reduced by the amount of earnings she collected that rightfully belonged to her husband. In other words, the husband would assert his rights by way of set-off or counterclaim. In the event the wife's earnings exceeded her support claim, she would have no claim at all and would simply forego support.

The basic structure of this proposal, however, can be easily modified to satisfy at least some of these objections. While *halacha* mandates a certain minimum level of support, there is nothing that prevents the parties from agreeing to a higher level. Furthermore,

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263. See *supra* note 81.

264. SHULCHAN ARUCH, *supra* note 15, EVEN HAEZER 80:1 (codifying the rule of BABYLONIAN TALMUD, *supra* note 4, KETUBOTH, at 59b).

265. *Id.*, EVEN HAEZER 69:3.

266. *Id.*

*halacha* recognizes the power of the husband to renounce any claim to his wife's earnings.<sup>267</sup> The parties could enter into a prenuptial agreement stipulating a high level of marital support for the periods of time that they do not share "bed and board" coupled with a waiver of the husband's claim to earnings. The agreement should further stipulate that it remains in effect only as long as the parties are *halachically* married; the designated amount is not designed to function as post-dissolution alimony but as spousal support. Because the agreement would be limited to marital support, it automatically ceases to be operative upon the granting of a *get*; therein lies its effectiveness as an incentive. To avoid characterization as a penalty, the stipulated amount should also be high enough to create an incentive to grant a *get*, but nonetheless bear some reasonable relationship to support. The husband must have the alternative of payment in lieu of a *get*;<sup>268</sup> and in no event should the amount be increased with the husband's continued recalcitrance.

This scheme ensures that the agreement is *halachically* acceptable and removes the taint of coercion from any resulting *get*. Not all men will respond to indirect monetary sanctions, but undoubtedly some will. Moreover, on some level support agreements may be more effective than other types of penalties because the benefits flow directly to the aggrieved spouse. While a truly spiteful husband might well prefer incarceration or a large fine to granting his wife a *get*, it is doubtful that he would regard paying his wife a large sum of money in the same favorable light. Admittedly, this type of agreement does not assist the victimized husband whose wife refuses to accept a *get*. At best, he is relieved of his contractual support obligation, but has no affirmative claim against his wife. Nevertheless, victimized husbands are a small part of the problem and in many cases have alternatives not available to women.<sup>269</sup>

This proposal is as easily adaptable to the United States as it is in Israel. Anglo-American law, however, poses two unique difficulties. First, in most states, divorced spouses may obtain judgments for alimony.<sup>270</sup> To the extent that a recalcitrant husband would be

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267. SHULCHAN ARUCH, *supra* note 15, EVEN HAEZER 80:18.

268. Technically, because separation agreements are specifically enforceable, the husband has three options—payment, *get*, or imprisonment. Execution of a *get* to escape incarceration does not qualify as an "execution under duress" where payment is a reasonable alternative. Where payment is an unreasonable alternative, however, the *get* is considered executed under duress. The concept of "genuine choice" is developed in 2 MOSES BEN YOSEF TRANI, *supra* note 83, at no. 138. *But cf.* 1 *id.* at no. 22.

269. See *supra* text accompanying notes 47-56.

270. Texas remains the only state whose statutes do not permit the award of alimony.

required to pay his wife alimony even after he grants her a *get*, the contractually assumed support obligation entered prior to the *get* would have little effect on his decision. In order to generate incentives for the granting of a *get*, the stipulated sum applicable for the period prior to the granting of a *get* must be considerably larger than any anticipated alimony award. This may create difficulties. As noted, if the sum is too large it may constitute a disguised penalty affecting the validity of a *get*; if no larger than the alimony (which in itself is based on support needs), it no longer serves as an incentive. Presumably, however, some amount in the middle could satisfy all requisite criteria, particularly in jurisdictions where alimony awards are parsimonious, where the wife's economic situation is favorable enough so that her alimony award would be low, or where alimony would be awarded in favor of the husband.<sup>271</sup>

The second problem is a bit more difficult to resolve. Essentially, the agreement is tantamount to a prenuptial separation agreement specifying a fixed sum for spousal support for a designated period until the execution of a religious divorce. The period in question may cover time before the granting of the civil divorce as well as afterward, in which case the agreement also covers alimony. Separation and support agreements, however, are always reviewable by the court to determine fairness.<sup>272</sup> The net result is that the stipulated amount may be regarded by a common-law court as a penalty and therefore not enforceable.<sup>273</sup>

If a financial obligation turns out to be unenforceable, it of course can no longer operate as an inducement to act. Nevertheless, such an agreement may still serve a useful purpose. An otherwise recalcitrant party may well prefer to grant a *get* immediately rather than face the prospect of a large civil liability that he may or may not be able successfully to challenge. Thus, the very existence of the agreement, whether it ultimately proves enforceable, may be sufficient to produce the desired result.

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*But see* Byrick v. Byrick, 601 S.W.2d 152 (Tex. Civ. App. 1980) (holding that although the court may not award alimony, it may approve and enforce an agreement for such support executed by the parties).

271. For a general discussion of the factors courts consider in setting alimony awards, see 3 FAMILY AND LAW PRACTICE §§ 35.01-35.06 (Arnold Rutkin, ed. 1985).

272. See HOMER CLARK, LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 16.13, at 557 (2d ed. 1988).

273. The court may also consider the factors enumerated above that negate a *get* as *meusah* when determining whether the award is truly a penalty, but this is not certain. See *supra* text accompanying notes 262-263.



### III. THE NEW YORK GET LAW: PERMISSIBLE ACCOMMODATION OR UNCONSTITUTIONAL ESTABLISHMENT?

#### A. General Operation of the Statute

In 1983, responding to the strong urgings of the Orthodox Jewish Community,<sup>274</sup> New York added section 253 to its Domestic Relations Law.<sup>275</sup> Popularly known as the "get law," it is designed to ensure that persons who do not give or receive *gittin* will be unable to receive the benefits of a civil divorce.<sup>276</sup> Applicable only to mar-

274. See *infra* note 276.

275. N.Y. DOM. REL. LAW § 253 (McKinney 1986). Section 253 was amended extensively by the New York legislature in 1984. See 1984 N.Y. Laws, ch. 945, § 1.

The enactment of the statute aroused considerable furor in both the legal community and the media. Representative articles in a somewhat polemical vein include a three-part series: Nat Hentoff, *The Day Mario Cuomo Shortened the First Amendment*, VILLAGE VOICE, Sept. 6, 1983, at 6; Hentoff, *supra* note 6, at 6; Nat Hentoff, *Mario Cuomo Flunks Introductory Constitutional Law*, VILLAGE VOICE, Sept. 20, 1983, at 5 [hereinafter Hentoff, *Cuomo Flunks*]; Madeline Kochen, *Constitutional Implications of New York's Get Statute*, N.Y. L.J., Oct. 27, 1983; Nathan Lewin, *The Constitutional Validity of New York's Get Statute*, N.Y. L.J., Nov. 16, 1983, at 1.

276. The dominant force in getting this legislation passed was the Agudath Israel organization, a political action and social service group under the auspices of the Orthodox movement. Aware of the so-called *agunah* crisis for a number of years, Agudath Israel sponsored an all-day conference in 1980 at which rabbis, attorneys, and legal academics discussed ways in which the problem could be addressed in a manner that was both *halachically* and constitutionally sound. The central concept of the *get* law, that the removal of barriers to remarriage following a *get* was a legitimate secular interest worthy of government protection, emerged from that meeting.

An earlier draft of the bill authored by Professor Alan Dershowitz of Harvard Law School—containing provisions for compulsory arbitration on the issue of compliance—was introduced in 1981. Correspondence with Agudath Israel, and conversations with Nathan Lewin, Esq. (principal draftsman of the Act). Mr. Lewin was also kind enough to make available his voluminous correspondence concerning the bill, which provided useful and enlightening background material, on file with author [hereinafter Lewin File]. The bill was overwhelmingly approved by both houses of the New York State Legislature. Nevertheless, Governor Carey expressed strong reservations regarding the constitutionality of the bill and, to avoid an anticipated veto, the sponsors withdrew their bill for further study. See Lewin File.

A revised bill authored by Nathan Lewin was introduced in 1983, and eliminated the arbitration panels, relying instead on a verified affidavit. See Lewin File. It again sailed through both houses of the legislature and was signed by Governor Cuomo in August 1983. See Lewin File. While aware of the constitutional objections raised by the New York Civil Liberties Union, the Union of American Hebrew Congregations (Reform), and the American Jewish Congress, Governor Cuomo stated that he found "no impelling precedent" to indicate that the bill was unconstitutional. See *Cuomo Signs Law To Block Misuse of Jewish Divorce*, N.Y. L.J., Aug. 10, 1983, at 1. "If there was such a precedent, I would defer to it . . . [but] [g]iven the clarity of the need, the efficiency of this statutory solution and the uncertainty of the constitutional objection, I approve the measure." *Id.* (quoting Governor Cuomo). He then concluded somewhat disingenuously that if there is a constitutional impediment he was sure that "our excellent courts will make that clear in due time"—an approach that some critics maintained was an abdica-

riages solemnized by a religious ceremony, the statute provides that no party to a marriage may obtain a judgment of annulment or divorce unless the party alleges in the verified complaint that to the best of his or her knowledge, the party has taken, or prior to entry of judgment will take, all "steps solely within his or her power to remove any barrier to the defendant's remarriage following the annulment or divorce," or that the defendant has waived in writing the need for such steps to be taken.<sup>277</sup> In the event the verified complaint merely contains a statement of intention concerning future compliance, the court must defer entering final judgment until the plaintiff files with the court and serves on the other party a sworn statement of actual compliance.<sup>278</sup> The court rendering the divorce judgment has no authority to inquire into the truth of any declaration made in the sworn statement or complaint, but the submission of a knowingly false declaration may give rise to a criminal prosecution for perjury.<sup>279</sup>

Because the operation of the statute is somewhat complex, it may be helpful to illustrate its workings through the situation it was designed to address. Assume a husband desires to obtain a civil divorce from his wife, but out of spite or blackmail he refuses to give her a *get*. Under her beliefs as a Jew, the wife will be unable to remarry. The husband will not be able to obtain the benefits of a civil divorce without filing a sworn statement that he has already removed any "barriers to remarriage" the other spouse faces.<sup>280</sup> Because "barriers to remarriage" includes "religious or conscientious restraints or inhibitions,"<sup>281</sup> the failure to execute a *get* clearly qualifies as such a "barrier" and the husband cannot truthfully file such an affidavit until a *get* is granted.<sup>282</sup>

The statute is very limited, covering a narrow category of cases and providing a fairly limited protective remedy. Under the statute, a court never directly orders the husband to comply with religious

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tion of the executive's legal responsibility to uphold the constitution. *Id.*; see Hentoff, *Cuomo Flunks*, *supra* note 275. Since 1983, model *get* bills have been introduced in California, Connecticut, Maryland, Michigan, and New Jersey, though none of these proposals have been enacted. Telephone Interview with David Zweibel, Esq., General Counsel of Agudath Israel (Dec. 1991).

277. See N.Y. DOM. REL. LAW § 253(2) (McKinney 1986).

278. See *id.* § 253(3)(i).

279. Under New York law, making a sworn "apparently false statement" is a "Class E" felony punishable by a prison term not to exceed four years. N.Y. PENAL LAW §§ 70.02(e), 210.40 (McKinney 1986). But see *infra* note 339.

280. N.Y. DOM. REL. LAW § 253(4).

281. *Id.* § 253(6).

282. See *id.*

law. It merely tells the husband that he will be unable to obtain a civil divorce until he complies, or at least alleges under oath that he has complied with religious law. If the husband is willing to forego the option of a civil divorce, he is perfectly free to leave his wife stranded. Indeed, even if the wife were to seek a civil divorce against a recalcitrant husband, the affidavit requirement would not be triggered; the obligation is imposed only on the plaintiff, not the defendant.<sup>283</sup> Assuming a stranded wife would eventually want to take some steps to protect her legal rights, therefore, the dictates of section 253 could be avoided by a recalcitrant husband simply biding his time.

Even when the husband is the divorce plaintiff, he will still be able to obtain relief by filing a false affidavit. Under subdivision 9 of section 253, the court may not inquire into the truthfulness of the allegations contained in the affidavit except in the context of a perjury prosecution under subdivision 8.<sup>284</sup> While the relationship of subdivisions 8 and 9 is not clear, the apparent meaning is that the court may not withhold the granting of a divorce on the grounds of evidence that the affidavit is fraudulent.<sup>285</sup> The court's only response is to forward such evidence to the district attorney for criminal prosecution.<sup>286</sup> While it is difficult to imagine a court permitting an obvious fraud, it is clear that the defendant cannot seek an evidentiary hearing on the merits. Thus, whatever protective force the statute has depends on the *in terrorem* effect of the criminal justice system and the vigilance of victimized spouses invoking that system.

Furthermore, the statute only applies where the original marriage was solemnized through a religious ceremony. It has no application to marriages that were effected civilly.<sup>287</sup> Moreover, by defining "barriers to remarriage" as those barriers that exist "under the principles held by the clergyman or minister who has solemnized the marriage,"<sup>288</sup> the statute requires the plaintiff to allege a granting of a *get* only when the original marriage ceremony was performed by an Orthodox or Conservative Rabbi.<sup>289</sup> In most cases, this poses no problem because if the wife is still an adherent of Re-

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283. See *id.* § 253(2).

284. See *id.* § 253(8), (9).

285. See *id.* § 253(9).

286. See *id.* § 253(8). But see *infra* text accompanying notes 292-294.

287. N.Y. DOM. REL. LAW § 253(1).

288. See *id.* § 253(6).

289. See Alan D. Scheinkman, *Practice Commentary*, N.Y. DOM. REL. LAW § 253, at 860-61 (McKinney 1986) (explaining difficulties presented by § 253(6) relating to an individual clergyman's beliefs and availability).

form, the absence of a *get* imposes no disability to remarriage.<sup>290</sup> It is not uncommon, however, for a change of religious affiliation or commitment in the course of a marriage—often in the direction of greater adherence to traditional beliefs—and women who do change their theological positions and now find themselves unable to remarry without a *get* are simply unprotected.<sup>291</sup>

In the event the plaintiff does file a false affidavit, the victimized spouse may invoke what is popularly termed the “clergyman’s veto.”<sup>292</sup> Even if the plaintiff files a sworn affidavit which states that to the best of his knowledge all “barriers to remarriage” have been removed, the court still may not enter a final judgment of divorce if the clergyman or minister who solemnized the marriage certifies in a sworn statement that the plaintiff has not accomplished this.<sup>293</sup> This “clergyman’s veto” is a back-up guarantee to the veracity of an affidavit. In the event the plaintiff seeks to obtain a divorce by filing a false affidavit, the defendant may defeat his petition by submitting an opposing one from the officiating minister.<sup>294</sup>

What the legislature intended to happen if this opposing affidavit is submitted is not at all clear. It is possible that the court will hold an evidentiary hearing to determine what the clergyman’s beliefs were and whether the requirements of those beliefs were met. This procedure is difficult to envision because it would involve the court in a direct inquiry concerning compliance with religious law, an entanglement with religion that the legislature carefully tried to avoid. What would probably happen—and the legislature should

290. See *supra* note 5.

291. Another limitation, though one easily surmounted, is that the affidavit need only allege that “to the best of plaintiff’s knowledge” such barriers have been removed. N.Y. DOM. REL. LAW § 253(3)(i). Theoretically even parties married by the Orthodox clergy may not always know their clergyman’s principles—specifically, that a *get* is required to dissolve a marriage. The statute also emphasizes that the plaintiff is under no duty of investigation or inquiry. See *id.* § 253(6). Nevertheless, this defect can be easily remedied by the defendant contacting the officiating clergyman, who can send a letter to the plaintiff informing him or her of his religious beliefs, or through invocation of the clergyman’s veto. See *id.* § 253(7).

292. The term “veto” is a misnomer with potential constitutional overtones. The clergyman is not vetoing governmental action but simply apprising the court of a fact. See *id.* § 253(7); *infra* text accompanying note 343.

293. N.Y. DOM. REL. LAW § 253(7). “[N]otwithstanding the filing of the plaintiff’s sworn statement,” a final judgment will not be entered “if the clergyman or minister who has solemnized the marriage” files an affidavit that essentially contradicts the plaintiff’s affidavit. *Id.* The sworn affidavit must state first, that the clergyman or minister solemnized the marriage, and second, that the plaintiff has failed to take the necessary steps to remove any barriers to marriage. See *id.*

294. See *id.*

clarify this—is that the court could not enter a judgment of divorce until the clergyman files a second sworn statement verifying that the plaintiff has now complied with the statute.<sup>295</sup> In the event the clergyman is no longer alive or competent to testify, the “veto” power of his earlier affidavit can be cancelled by the plaintiff’s affidavit alone,<sup>296</sup> and the court will issue a judgment of divorce.

Allowing the clergyman’s affidavit to control even after he becomes unavailable to testify would place the plaintiff in an untenable position by permanently disabling him from obtaining a divorce even if he later complied with religious dictates. The only alternative to cancellation would be to permit the plaintiff to rebut or show compliance by submitting the affidavit of some other clergyman, but such a procedure could embroil the court in inquiries concerning clergy competence and affiliation, denominational belief, and other religious issues, all of which are avoided when only the officiating clergyman is allowed to speak.<sup>297</sup> Admittedly, however, it would make more sense to require the plaintiff to file a new verified affidavit, rather than relying on the old, discredited one.

Some other peculiarities in the statute are also worthy of note. For example, “barrier to remarriage” does not include restraints or inhibitions that cannot be removed by the plaintiff’s voluntary act.<sup>298</sup> Thus, if a Catholic husband files for divorce, he will be entitled to civil relief even though neither spouse is able to remarry because the barrier is not removable by action of the parties. The law further makes it clear that the plaintiff is not required to remove barriers to remarriage by application to ecclesiastical tribunals.<sup>299</sup> Presumably, a Jewish divorce proceeding does not constitute “application to a tribunal,” for although a *bais din* is required, the function of the *bais din* is supervisory rather than judicial, with the actual divorce effected by the acts of the spouses rather than the declaration of the court.<sup>300</sup> To the extent that removal of barriers can be accompanied only by the plaintiff incurring expenses, the plaintiff need not remove such barriers unless and until the other party reim-

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295. An earlier proposal would have made this explicit, but this version was never enacted into law. See Lewin File, *supra* note 276.

296. See N.Y. DOM. REL. LAW § 253(7).

297. An earlier proposal would have allowed another clergyman, who certifies that he holds the same religious principles as the officiator, to testify if the officiator is not available. See Lewin File, *supra* note 276.

298. N.Y. DOM. REL. LAW § 253(6).

299. See *id.*

300. See *supra* note 2.

burses or agrees to reimburse those expenses.<sup>301</sup>

Finally, in theory the statute is self-executing. Where "barriers to remarriage" exist under the principles of the officiating clergyman, the plaintiff may not obtain a civil divorce even if neither party desires a *get*.<sup>302</sup> Read literally, the statute imposes the need for a *get* even in cases of divorce by mutual consent of a Reform couple who happened to have been married by an Orthodox Rabbi.<sup>303</sup> As currently worded, however, this should no longer be a problem. If neither party wants a *get*, the requirement of a complying affidavit by the plaintiff can be waived by the defendant.<sup>304</sup>

### B. Constitutional Issues: The Traditional Tests<sup>305</sup>

It was well understood by the drafters of the New York law, its sponsors, and Governor Cuomo that the *get* law posed serious constitutional problems under the First Amendment, though the precedents were not definitive one way or the other.<sup>306</sup> To date, however, no successful constitutional attack has been launched against the main features of the law.<sup>307</sup>

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301. See N.Y. DOM. REL. LAW § 253(6).

302. See *id.*

303. See *id.*

304. See *id.* § 253(4), (5).

305. The text in this Subpart applies the traditional constitutional standards that have been employed by the Supreme Court in analyzing establishment and free exercise claims and that were in effect when the *get* law was first enacted. These standards are in the process of undergoing reexamination. Current developments and speculations as to the future are discussed *infra*, Part V. It is the view of this author that these developments will not affect the basic conclusions stated herein. See *infra* Subpart V.C.

306. See *supra* note 276.

307. Rostain, *supra* note 167, at 1149. Thus far *Chambers v. Chambers*, 471 N.Y.S.2d 958 (Sup. Ct. 1983), is the only case to address the constitutionality of the *get* statute. Rostain, *supra* note 167, at 1149 n.15. New York opinions, to date, have generally been supportive of the bill's provisions. See, e.g., *Friedenberg v. Friedenberg*, 523 N.Y.S.2d 578, 581 (N.Y. App. Div. 1988) (Until a plaintiff complies with the affidavit requirement, he may not receive any benefits under the divorce judgment, and transfers of money or property to plaintiff are stayed.). The only issue of controversy—an issue now rendered moot with the passage of time—was the application of § 253 to actions already pending at the time of its enactment. Compare *Chambers v. Chambers*, 471 N.Y.S.2d 958, 961 (N.Y. Sup. Ct. 1983) (holding that applying § 253 to a written separation agreement entered into before the effective date of the *get* statute would be an unconstitutional impairment of contract) with *Pinkesz v. Pinkesz*, reported in N.Y. L.J., Dec. 5, 1984, at 13 (holding that § 253 does apply to pending actions, at least to the extent there is no antecedent separation agreement). Another area of potential conflict arose under an earlier version of the statute that required both parties to submit affidavits in uncontested proceedings. This meant that there were cases where a plaintiff could not obtain a civil divorce unless a defendant filed an affidavit. The *Chambers* court intimated in dicta that conditioning a plaintiff's relief on the responses of a defendant may well be a denial of due process. *Chambers*, 471 N.Y.S.2d at 960. Under the present version of the law,

1. *The Inescapable Conflict Between Establishment and Free Exercise.*—The *get* law poses the constitutional problem of whether it permissibly accommodates free exercise or impermissibly establishes religion. On one level, the affidavit requirement is a reasonable accommodation of the religious needs of those who would otherwise be unable to remarry. At the same time, however, conditioning the receipt of a civil remedy on the performance of an act prescribed exclusively by religious law seems to be equivalent to state-compelled religious obedience. And while compelling a *get*, albeit indirectly, is presumably not a violation of free exercise where recalcitrance is not based on religious commitment, it nevertheless seems to approach closely those concerns of neutrality that are mirrored in the Establishment Clause.

In *Lemon v. Kurtzman*,<sup>308</sup> the Supreme Court announced a tripar-

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while there is still a double affidavit requirement in uncontested proceedings, the plaintiff would be able to waive the defendant's duty to file and would thus be able to secure a divorce on a single affidavit—his own. N.Y. DOM. REL. LAW § 253(4) (McKinney 1986). The *Chambers* issue is thus not likely to arise again.

308. 403 U.S. 602 (1971). This pivotal case marked a turning point, departing from a permissive stance in the area of aid to parochial schools. Prior to *Lemon*, the Court had upheld state statutes that provided reimbursement of transportation costs for parents of students attending public and private schools, *Everson v. Board of Educ.*, 330 U.S. 1 (1947), as well as programs providing parochial schools with textbooks for secular studies, *Board of Educ. v. Allen*, 392 U.S. 236 (1968), on the grounds that the funds were used for a nonreligious purpose. *Lemon*, on the other hand, invalidated a state program that provided salary supplements for teachers in parochial schools, even though the supplements were limited to hours spent teaching secular subjects. According to the majority opinion, teacher salary supplements differed from textbooks: instructors may advance religious doctrines even in the course of teaching secular subjects, and through salary subsidies, the state would effectively be funding the religious part of the curriculum. See *Lemon*, 403 U.S. at 619. The only way to prevent this would be to institute an on-going surveillance program that in turn would constitute excessive entanglement. See *id.*

Since *Lemon*, the Court has invalidated virtually any type of public aid to private schools other than transportation and textbooks, which it grudgingly permits, more for reasons of precedent than principle. See, e.g., *Levitt v. Committee for Public Educ.*, 413 U.S. 472, 482 (1973) (invalidating New York program that granted private schools reimbursement for services mandated by state law, such as record keeping and testing); *Committee for Public Educ. v. Nyquist*, 413 U.S. 756, 798 (1973) (invalidating financial aid programs for private elementary and secondary schools); *Sloan v. Lemon (Lemon II)*, 413 U.S. 825, 835 (1973) (invalidating parental tuition reimbursement programs in the forms of tax credits); *Meek v. Pittenger*, 421 U.S. 349, 372 (1975) (invalidating program of lending instructional materials to nonpublic schools and providing auxiliary testing services by public school personnel).

Recognizing that instructional materials were fundamentally the same as textbooks, the *Meek* court allowed *Allen* to stand on the basis of stare decisis, but refused to extend it any further. See *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 397 (1985) (invalidating "shared time" programs where public school employees teach secular subjects in private schools); *Aguilar v. Felton*, 473 U.S. 402, 414 (1985) (prohibiting use of federal funds to

tite test for determining an impermissible establishment of religion, a test that it still applies today.<sup>309</sup> A law accommodating or benefiting religious practice is valid only if it has a "secular purpose," if its "primary effect . . . neither advances nor inhibits religion," and if its operation does not lead to "excessive government entanglement" with religious doctrine or the internal administration of religious affairs.<sup>310</sup> The *Lemon* formulation has been sharply criticized as essentially meaningless and infinitely malleable.<sup>311</sup> Furthermore, its application has yielded sharply inconsistent results, often in five to four decisions.<sup>312</sup> Taken literally, *Lemon* would invalidate nearly any statutory accommodation of religion because the primary purpose and effect of all religious provisos are to benefit a particular religious group.

Justice O'Connor has advocated a useful restatement of the *Lemon* test substituting the term "endorsing" in place of "advancing."<sup>313</sup> According to this test, the fact that particular legislation proves "beneficial" to a religious group would not invalidate it as long as such an accommodation does not carry with it the implication or appearance of endorsement of one religion at the expense of another, or the endorsement of religion over nonbelief. While a

pay salaries of public school teachers who provided nonreligious instruction on premises of private schools). The Court has been more sympathetic to programs extending aid to universities, on the theory that the potential for indoctrination is considerably reduced. See, e.g., *Hunt v. McNair*, 413 U.S. 734, 749 (1973) (upholding state statute that authorized issuance of revenue bonds benefiting a religiously affiliated college).

309. *Lemon*, 403 U.S. at 612-13; see, e.g., *Bowen v. Kendrick*, 487 U.S. 589, 602-04 (1988) (applying *Lemon* test). But see *infra* Subpart V.B (discussing whether *Lemon* is likely to survive).

310. *Lemon*, 403 U.S. at 612-13.

311. For in-court criticism, see *Wallace v. Jaffree*, 472 U.S. 38, 91, 108-12 (1985) (Rehnquist, J., dissenting). For critical commentary, see generally Johnson, *supra* note 181; Schwartz, *supra* note 181, at 179; Nancy Blyth Hersman, *Lynch v. Donnelly: Has the Lemon Test Soured?*, 19 LOY. L.A. L. REV. 133 (1985) (an especially useful review of inconsistent lower court opinions struggling to apply *Lemon* to various situations); Yehudah Mirsky, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237 (1986).

312. Compare *Meek v. Pittenger*, 421 U.S. 349, 372 (1975) (invalidating publicly funded auxiliary testing services to private schools) with *Committee for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 646, 660-61 (1980) (upholding state financing of achievement tests). See also the wavering lines of distinction drawn in cases like *Wolman v. Walter*, 433 U.S. 229, 241-48 (1977) (differentiating between diagnostic or therapeutic tests and those designed to promote or improve educational achievement).

313. See *Lynch v. Donnelly*, 465 U.S. 668, 690-92 (1984) (O'Connor, J., concurring) ("The proper inquiry under the purpose prong of *Lemon* . . . is whether the government intends to convey a message of endorsement or disapproval of religion."); *Wallace*, 472 U.S. at 76, 83 (O'Connor, J., concurring) ("The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementations of the statute, would perceive it as a state endorsement . . .").



majority of the Court has never accepted her precise verbal formulation, the cases do suggest that the concept of "endorsement" may be a useful touchstone to differentiate those accommodations that are prohibited from those that are permitted to stand.<sup>314</sup>

Normally the opposite question is presented when legislation is challenged on free exercise grounds. When legislation or a regulation of general applicability makes no provision or exclusion for religion, often the objection is raised that the failure to provide such an exemption is an infringement of religious liberty.<sup>315</sup> While a number of justices, particularly Justice Stevens,<sup>316</sup> had rejected this contention outright (as would Professor Kurland<sup>317</sup>), the prevailing test had been, at least until quite recently, that religious exemptions must be recognized unless there is a compelling state interest that could not be adequately served by less restrictive means.<sup>318</sup> Thus, in responding to a free exercise challenge, the Court analyzed both

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314. See *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 389 (1985) (citing *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)); see also *Wallace*, 472 U.S. at 56 ("In applying the purpose test, it is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion.'" (footnote omitted) (quoting *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring))).

315. See, e.g., *Employment Div. Dep't of Human Resources v. Smith (Smith II)*, 494 U.S. 872, 919 (1990) (Blackmun, J., dissenting) (noting that respondents sincerely believed that the peyote plant embodies their deity, and "[w]ithout peyote, they could not enact the essential ritual of their religion"). The respondents in *Smith II* argued that their religious freedom was infringed upon through the application of Oregon's drug laws. See *id.* at 878.

316. See *Goldman v. Weinberger*, 475 U.S. 503, 510 (1986) (Stevens, J., concurring) (5-4 opinion holding no constitutional right to wear yarmulke for air force officer); *United States v. Lee*, 455 U.S. 252, 261 (1981) (Stevens, J., concurring); see also *infra* note 336. There are strong indications that Stevens's views have prevailed, at least temporarily in the narrow context of criminal prosecution. See *infra* Subpart V.A.

317. See *supra* notes 171-172 and accompanying text.

318. The basic standard is set down in *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961). Ironically, over a spirited dissent by Justice Stewart, the Court upheld the constitutionality of Sunday closing laws as applied to Sabbath-observing Jews, who would lose an extra day of business. See *id.* at 608-09. The need for a uniform day of rest was an "overriding" secular goal that justified the indirect burden on free exercise. *Id.* at 607. The term "compelling" was introduced in *Sherbert v. Verner*, 374 U.S. 398, 406, 409-10 (1963) (holding that state could not deny unemployment compensation to a Seventh-Day Adventist who lost her job for refusing to work on Saturdays; the state interest in not paying persons who voluntarily terminate their employment could be adequately served through less restrictive means). *Sherbert*'s holding was recently reaffirmed in *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 140-41 (1987) (holding that Florida's refusal to award unemployment compensation benefits violated the Free Exercise Clause of the First Amendment). The *Smith II* case, discussed *infra* Part V, may have sounded the death-knell for the type of strict scrutiny envisioned under *Sherbert*. I nevertheless discuss the application of *Sherbert* to the *get* law because first, that was the test in effect when the law was enacted and second, even after *Smith* there may be discrete contexts in which the "compelling state interest" test survives. See *infra* Part V.

the importance of the governmental end and the reasonableness of the means employed to attain that end. Although the magnitude of the state's interest did not have to be as significant as is required for other areas where the term "compelling" is used, and although the Court's application of its own test often appeared flawed or questionable,<sup>319</sup> the familiar "ends-means" analysis was still the vehicle most commonly employed, at least until *Employment Division, Department of Human Resources v. Smith* (*Smith II*).<sup>320</sup>

Yet, the establishment and free exercise tests have never been brought together. Under *Lemon*, any explicit religious exemption seemed to constitute an impermissible establishment, because its purpose and effect is to aid religious observance. On the other hand, in the absence of a compelling state interest, the very thing the Establishment Clause prohibits the Free Exercise Clause requires. The Court's tacit assumption was that free exercise concerns predominated in cases of conflict, but the Court offered no principled explanation for that position.<sup>321</sup> Once again, however, Justice O'Connor's insight was particularly helpful in resolving this apparent dilemma. If the accommodation in question did not constitute an endorsement placing the state's imprimatur on religious activity, or conveying a message to the populace favoring religion over nonreligion, it was not an establishment at all. As such, the conflict between free exercise and establishment was largely illusory. Put in the language of *Lemon*, the facilitation of free exercise was in itself a legitimate secular purpose that justified governmental intervention.<sup>322</sup>

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319. In cases involving racial discrimination, requiring an interest to be "compelling" tends to obliterate that legislative program. See *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967) (holding that statute prohibiting interracial marriages involving whites violates Due Process Clause of Fourteenth Amendment). No interest is ever important enough to allow such discrimination to proceed. See *id.* In free exercise cases, however, the Court has been quite willing to declare relatively trivial interests "compelling." See *Braunfeld*, 366 U.S. 599 (1961) (Sunday closing laws); *Goldman v. Weinberger*, 475 U.S. 503, 510 (1986) (5-4 opinion denying air force officer the right to wear a yarmulke).

320. 494 U.S. 872 (1990). *Smith II* essentially abrogated any constitutional need to accommodate religious observance, at least in the context of criminal prosecution, and severely curtailed the scope of free exercise claims. See *infra* Subpart V.A.2.

321. See *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230, 247 (1963) (Brennan, J., concurring) ("[T]he logical interrelationship between the Establishment and Free Exercise Clauses may produce situations where an injunction against an apparent establishment must be withheld in order to avoid the infringement of rights of free exercise.").

322. Indeed, O'Connor's analysis provides a useful analytical framework even after *Smith II*. Although accommodation of free exercise is no longer a constitutional requirement, it is nevertheless a permissible step, and legislation attempting such facilitation should be deemed to have a secular purpose. See *generally infra* Part V.

2. *Applying the Establishment Test to the Get Law.*—In applying the *Lemon* criteria to the *get* law, a number of points should be kept in mind.<sup>323</sup> First, the purpose of the New York legislation can be defined clearly in secular terms as a viable means of attaining legitimate state interests. Indeed, a number of discrete, although related, interests may be identified. First, the state has a legitimate secular interest in ensuring the integrity and efficacy of its judgments. The policy of the New York divorce law is that a marriage that is dead in fact should no longer exist and that the parties should have the freedom to rebuild their lives anew. Maintaining barriers to remarriage following a judgment of divorce frustrates the policy behind divorce statutes and the integrity of the judicial system.

Second, without such a law, women practicing the Orthodox faith would be under additional burdens or disadvantages following a civil divorce compared with other women not holding such beliefs. In its attempts to equalize the status of all women following the granting of a civil divorce, the state is merely accommodating the practice of religion by removing its disadvantages, rather than establishing it in a preferred position. As Justice O'Connor notes, the facilitation of free exercise is in itself a legitimate secular state interest that the legislature may address.<sup>324</sup> The state has a legitimate interest in facilitating marriage and a stable family life. The ability to marry and raise a family is also an aspect of the fundamental constitutional right to privacy protected and recognized by *Roe v. Wade*.<sup>325</sup> The state has a legitimate state interest in facilitating the ability of its citizens to exercise and enjoy their constitutional rights. Although the deprivation in question arises from private rather than public or governmental action, states should as a matter of principle have the authority, if not the obligation, affirmatively to protect those rights even from private infringement.<sup>326</sup>

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323. Whether the *Lemon* test is likely to survive, and what may take its place, are discussed *infra* Subpart V.B.

324. See *Wallace v. Jaffree*, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring).

325. 410 U.S. 113 (1973); see also *Zablocki v. Redhail*, 434 U.S. 374 (1978) (holding that state statute conditioning freedom to marry on showing that support obligations to minor children have been met violates due process). Indeed, the right to marry has been regarded as a fundamental right even prior to the recognition of a general constitutional right of privacy. See *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down miscegenation statute because it interfered with the fundamental right to marry, which is protected by the Due Process Clause).

326. As a general proposition, constitutional rights may be asserted only against the government or its agents. See *The Civil Rights Cases*, 109 U.S. 3 (1883). This limitation is commonly termed the "state action" doctrine, though it should more properly be called the "governmental action" requirement, because its standards are met by federal as well

Where a *get* is withheld out of malice or spite or for reasons of extortion, the state has an additional interest in protecting its citizens from being victimized by unfair, coercive practices. Many states have recognized intentional infliction of emotional distress as an independent tort.<sup>327</sup> The alleviation of human suffering caused by another is a proper goal of state legislation.

In short, the justifications for the New York law appear to be secular in purpose: the furtherance of the state's divorce policy, the validation of the integrity of the judicial system, the facilitation of religious liberty, the encouraging of remarriage and a more stable family life, the protection of fundamental rights of privacy, and the curbing of victimization and extortion all appear to fall within the traditional ambit of general legislative competence. On balance, the "secular purpose" prong of *Lemon* can be easily satisfied.

The second prong of *Lemon* requires that the primary effect of the law must not be the "advancement" of religion. Undoubtedly, in a literal sense the act advances religion in two distinct ways: it makes the observance of Orthodox Judaism less burdensome to some of its adherents by eliminating the peculiar disabilities they would otherwise suffer; and it indirectly encourages persons to comply with religious law who otherwise would not—recalcitrant spouses who seek a civil divorce. As noted, the "effect" of making the practice of Judaism less burdensome on its willing practitioners is probably nothing more than a permissible accommodation of free exercise and does not offend *Lemon*'s "primary effect" criterion. The second aspect, however, is more problematic. A law that indi-

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as state activity. The notable exception is the Thirteenth Amendment, which prohibits involuntary servitude of any nature, whether public or private. *Id.*; see also *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (holding that 42 U.S.C. § 1982, guaranteeing citizens the right to purchase and convey property, prohibited even private discrimination in housing; such prohibition was constitutional because private discrimination was a "badge of slavery" that Congress was empowered to eradicate under the Thirteenth Amendment). It remains an open question whether Congress, in its attempts to protect constitutional freedoms other than those arising under the Thirteenth Amendment, could outlaw purely private discrimination without relying on some plenary power like the Commerce Clause, though in many cases expansive interpretation of the Thirteenth Amendment and the concept of "badges of slavery" may furnish the requisite peg. See *United States v. Guest*, 383 U.S. 745 (1966) (where six justices expressed in dicta that Congress could prohibit private infringements of constitutional rights); see also *Westberry v. Gilman Paper Co.*, 507 F.2d 206 (5th Cir. 1975) (holding 42 U.S.C. § 1985(3) applicable to private acts of violence; a conspiracy to kill constituted a deprivation of rights of due process and equal protection); cf. *Bellamy v. Mason's Store, Inc.*, 508 F.2d 504 (4th Cir. 1974) (holding that while § 1985(3) does not apply to private acts, Congress would be fully within its power to enact a statute that did).

327. See *infra* note 390.

rectly compels an unwilling party to perform a religious act, even if there are legitimate secular purposes for doing so, seems to have the "effect" of advancing religious observance. Yet the mere fact that the law has such an "effect" is not yet sufficient for its invalidation; the impermissible effect must be "primary."

Determining what a "primary" effect is and how it is to be distinguished from a "purpose" are difficult definitional questions that have never been clearly addressed.<sup>328</sup> One possibility emerging from the cases is that "primary" is synonymous with "direct and immediate," as opposed to "indirect and attenuated."<sup>329</sup> Thus, to take one example, secular textbook loans by school boards to parochial schools are constitutionally permissible even though they indirectly advance the cause of religion by freeing additional resources for religious study, because the purpose of the program is secular and the benefit is indirect.<sup>330</sup> By contrast, teacher-salary supplements, even to cover the salary of teachers of secular subjects, are not constitutionally permissible, because all teaching may contain religious elements and government money cannot be used to directly fund religious education.<sup>331</sup>

If "primary" is defined as "direct and immediate," one would have to conclude that the New York *get* law's "primary effect" is the advancement of religion, for the granting of the *get* is precisely the

328. The Supreme Court has recognized the difficulty of applying the "primary effect" inquiry in Establishment Clause cases. See *Bowen v. Kendrick*, 487 U.S. 589, 604 (1988).

329. One district court adopted this definition of the "primary effect" inquiry. See *Kendrick v. Bowen*, 657 F. Supp. 1547 (D.D.C. 1987), *rev'd*, 487 U.S. 589 (1988). The district court stated that "the Supreme Court instructs us to examine whether the statute has a 'direct and immediate' effect, or a 'remote and incidental' effect, of advancing religion." *Id.* at 1560. Although the Supreme Court reversed the district court's determination of unconstitutionality, it utilized the same inquiry. See *Bowen v. Kendrick*, 487 U.S. 589, 607 (1988) (federal statute in question had "at most" an "incidental and remote" effect of advancing religion).

Moreover, characterizing the effect as "direct and immediate" as opposed to "incidental and remote" has been implicit in Establishment Clause jurisprudence. See *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) (holding that statute granting absolute right not to work on Sabbath "goes well beyond having an 'incidental or remote' effect of advancing religion"); *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984) (holding that endorsement of religion effected by crèche is merely "indirect, remote, and incidental"); *Committee for Public Educ. v. Nyquist*, 413 U.S. 756, 774 (1973) (holding that New York statutory scheme for financial aid to nonpublic schools had "primary effect that advances religion in that it subsidizes directly the religious activities" of nonpublic schools).

330. See *Bowen v. Kendrick*, 487 U.S. at 607 ("Nothing in our previous cases prevents Congress from making such a judgment or from recognizing the important part that religion or religious organizations may play in resolving secular problems.").

331. See *Nyquist*, 413 U.S. at 774.

result that the operation of the statute produces. The law, albeit for secular purposes, directly provides that no civil divorce can be obtained until the remarriage barrier is removed.<sup>332</sup> The performance of the religious act is not an incidental by-product of the operation of the statute, but rather the very consequence that is intended to be produced, although for nonreligious reasons.

If, however, the notion of "advancing" religion is equated with affirmative promotion or endorsement, the analysis takes a different turn. The statute carries no implication that Orthodox Judaism is a preferred way of life that should be encouraged, nor even that a *get* is a preferred method of dissolution of a marriage. In the first place, the language of the statute is facially neutral, speaking of removal of any barriers, whether religious or conscientious.<sup>333</sup> Second, the statute does not require that barriers to remarriage be removed unless the other party feels constrained by them.<sup>334</sup> Thus, the statute is not promoting compliance with religious divorce law as something intrinsically desirable, but only as a means of releasing someone else's bind, which itself was generated by the recalcitrant party's own choice of solemnization. Third, while the delivery of a *get* is a religious act in the sense of being mandated by religious law, it is a nonliturgical act that requires no profession of faith or overt expression of belief.<sup>335</sup> It is not clear that encouraging the performance of a Jewish law ceremony constitutes an endorsement or promotion of Jewish values, where that ceremony is under Jewish law akin to the dissolution of a partnership, and is largely devoid of theological significance. After all, parties who are nonobservant or non-Jewish already have the rights and benefits that the statute attempts to secure for the Orthodox woman. The statute hardly places an observant Jew or his or her beliefs on a pedestal. Indeed, most crucial of all, because the statute does no more than assure that Orthodox women following a civil divorce will enjoy the same rights and privileges as anyone else—and no more—such an equalization effort is far more likely to be perceived by the citizenry as an accommodation of the free exercise beliefs of the wife rather than an endorsement or pro-

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332. See N.Y. DOM. REL. LAW § 253 (McKinney 1986).

333. The New York statute defines "barrier to remarriage" broadly, including "without limitation, any religious or conscientious restraint or inhibition." *Id.* § 253(6). The statute is captioned by the heading, "Removal of barriers to remarriage." *Id.* § 253.

334. The statute only requires that barriers to remarriage be removed when the defendant in a divorce proceeding has not "waived in writing the requirements" of the statute. *Id.* § 253(2)-(4). The necessary implication is that if the defendant has waived the protection of the statute, there is no feeling of constraint.

335. See *supra* note 2.

motion of the wife's beliefs.<sup>336</sup>

The final element of the test is whether the law in question necessitates "excessive entanglement" in religious affairs.<sup>337</sup> Entanglement exists if the legislative scheme necessitates continual monitoring or administrative supervision over religious institutions or programs or requires the court to resolve doctrinal matters.<sup>338</sup> At least under the present version of the statute, neither of these factors seems to be present. While the statute does require that the plaintiff submit an affidavit that he or she has removed all religious barriers to remarriage, the court need not hold evidentiary hearings or make particularized findings. Upon receipt of the affidavit, the court must enter a judgment of divorce, and may not inquire into the truthfulness of the allegations.<sup>339</sup> Issues concerning the technical validity of the *get*, the qualifications of the executing Rabbis, and whether the principles of the officiating clergyman have or have not been met and what those principles are—questions that could indeed entangle the court in complex doctrinal matters—pose matters that the court simply does not and may not address.

The only way plaintiff's affidavit can be contested is by the officiating clergyman filing an opposing affidavit.<sup>340</sup> The statute is not clear as to what happens after this filing. If the court is then supposed to hold an evidentiary hearing to determine whether there has been compliance with religious law, there may indeed be entanglement problems in at least some cases, though not all. If, for example, a plaintiff has given a *get* under the supervision of a left-wing Orthodox group and the officiating clergyman alleges that such a group is not truly Orthodox, it would certainly not be constitutionally desirable for the court to determine the religious scope of a denomination. Where, on the other hand, the contested issue boils

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336. The perception that the public has regarding the nature of a particular legislative program is material to an Establishment Clause analysis. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971) (emphasizing political divisiveness and polarization as an evil that the Establishment Clause attempts to minimize). Cf. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 1039, 1054-60 (3d ed. 1986) (criticizing the "political divisiveness" test as largely superfluous, but acknowledging that the Court continues to invoke it).

337. See *Lemon*, 403 U.S. at 612-13.

338. See *id.* at 619.

339. A necessary precondition of a final judgment of annulment or divorce under the statute is the filing of a sworn statement to the effect that all barriers to remarriage have been removed. See N.Y. DOM. REL. LAW § 253(2)-(4) (McKinney 1986). However, "[t]he truth of any statement submitted pursuant to this section shall not be the subject of any judicial inquiry." *Id.* § 253(9). Therefore, the affidavit is conclusive, and a final judgment will be entered upon its filing. *Id.* § 253(2)-(4).

340. See *id.* § 253(7).

down to a simple question of fact—whether there was any *get* given at all—there would be no objection to a judicial resolution of a non-doctrinal issue.

It is plausible, however, that in the event of an opposing clergy affidavit, the statute does not contemplate a judicial hearing at all. Rather the clergyman's affidavit must be accepted as conclusive until the clergyman can file a supplemental affidavit of compliance. Thus, at no time does the court ever examine any question of Jewish law or doctrine; it simply responds automatically to the verified statements submitted.<sup>341</sup> Moreover, because the only clergyman authorized to contest the plaintiff's affidavit is the one who actually officiated, tricky definitional questions regarding denominational affiliation are avoided.

A number of commentators have objected to the "clergyman veto" provision.<sup>342</sup> Although under the terms of the statute, a court never makes its own findings on the existence of barriers to remarriage, they argue that because the judicial power to issue a civil divorce is conditioned on the consent (or at least failure to object) of a member of the clergy, giving religious authorities a veto on the exercise of governmental authority is in itself an impermissible entanglement with religion.<sup>343</sup> In *Larkin v. Grendel's Den*,<sup>344</sup> for example, the Supreme Court invalidated a zoning law that granted schools or churches a veto power over the issuance of a liquor license for any establishment within a 500 foot radius of their premises.<sup>345</sup> Because such a law "enmesh[ed] churches in the exercise of substantial government power," the Court held that the law violated the constitutional strictures against establishment.<sup>346</sup>

Reliance on *Larkin*, however, appears misplaced. *Larkin* dealt with a state procedure that conferred unbridled discretion on eccle-

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341. The statute expressly forbids judicial inquiry into religious matters and into the truth of any affidavits submitted under the statute:

Nothing in this section shall be construed to authorize any court to inquire into or determine any ecclesiastical or religious issue. The truth of any statement submitted pursuant to this section shall not be the subject of any judicial inquiry, except as provided in subdivision eight of this section.

*Id.* § 253(9). The statute nevertheless imposes criminal penalties on one who makes a false sworn statement under the statute. *Id.* § 253(8).

342. See Kahan, *supra* note 214, at 206; Lawrence C. Marshall, Comment, *The Religion Clauses and Compelled Religious Divorces: A Study in Marital and Constitutional Separations*, 80 NW. U. L. REV. 204, 254 (1985); Redman, *supra* note 187, at 411.

343. See Kahan, *supra* note 214, at 206.

344. 459 U.S. 116 (1982).

345. See *id.* at 126.

346. *Id.*



siastical authorities to dictate the operations of government.<sup>347</sup> In effect, zoning decisions became a shared responsibility of church and state, at least under the conditions specified in the zoning ordinance. Such a sharing of authority is clearly inimical to the ideals of the First Amendment, whether it is condemned under the rubric of "entanglement" or that of "endorsement." By contrast, despite its description as a "clergy veto"—a phrase that invites superficial comparison to *Larkin*—the provision in the *get* law for an opposing affidavit does not confer any element of judgment, discretion, or decision-making authority on religious functionaries. The only means by which they can prevent the issuance of a civil divorce is by alleging a fact that is already legislatively defined and specific: that the party failed to remove barriers to remarriage (whether or not a *get* was executed).<sup>348</sup> Assuming the state could designate that fact as a relevant criterion for the withholding of a divorce—and it appears that it could for the reasons stated above—using the clergy as mere conduits of information may in fact be the only constitutionally permissible way to proceed.

A final potential entanglement problem may arise when a plaintiff is criminally prosecuted for filing a false affidavit. Theoretically, one could imagine situations where some form of a dissolution ceremony occurred that allegedly was not in consonance with the principles of the solemnizing clergyman. Where that clergyman is no longer available, it will be necessary to establish those principles through expert testimony. In such a case, there may be doctrinal disagreements between denominations, or within a denomination, that the court might have to resolve.<sup>349</sup> Even in these marginal cases, however, the court is not called upon to resolve doctrinal issues, but simply to determine as a matter of fact what the beliefs of the officiating clergyman were, regardless of their ultimate truth or validity. Because the inquiry is phrased not in terms of the beliefs of the denomination, but those of the actual clergyman, the potential

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347. See *id.* at 127.

348. N.Y. DOM. REL. LAW § 253 (McKinney 1986).

349. Consider the following example: The officiating rabbi was ordained in an Orthodox seminary, took a position in a Conservative temple, but retained his membership in Orthodox rabbinical associations. The couple in question were divorced through the delivery of a *get* prepared by the Conservative rabbinate. The husband obtained a civil divorce by filing the affidavit. In a criminal prosecution alleging that the affidavit was false for failure to execute an Orthodox *get*, where the officiating clergyman is not available to testify, the court would be required to make findings concerning the denominational affiliation of the officiating rabbi and whether, based on his hybrid status, he would subscribe to the Conservative or the Orthodox method of *get*.

for doctrinal embroilment is slight. If the clergyman is available, he should simply be taken at his word. If the clergyman is not available, the court should be able to take testimony concerning a disputed state of mind. What religious beliefs a person in fact entertained (as opposed to whether those beliefs are valid) is fundamentally no different than any other question of fact a judge or jury is called upon to resolve, and should fall within the ambit of judicial competence.

Finally, in the run-of-the-mill criminal prosecution there will be no serious entanglement question at all; it is generally safe to surmise that no *get* was given. Because the basic meanings of affiliations are well understood, establishing the Conservative or Orthodox credentials of the officiating rabbi would automatically mean that the affidavit was false without the need to proceed any further in fine analytical distinctions. The ability of a fertile imagination to conjure up cases where the court will have to choose between the competing readings of the *Shulchan Aruch* on the basis of conflicting rabbinical opinion should not obscure the fact that this event will be so rare as to be practically nonexistent. If in rare cases such entanglement is present, the solution would be to stay a particular prosecution in a given case, rather than striking down the law in its entirety.<sup>350</sup>

While, as Governor Cuomo remarked, the matter is not free of doubt, the New York *get* law appears to meet all three of the *Lemon* criteria for validity. The purpose of the law is to advance purely secular interests, including the facilitation of free exercise by those who otherwise would be burdened because of their religious beliefs. The primary effect of the law is not the "endorsement" or promotion of religion; the law simply equalizes the rights of women holding certain beliefs with those of women who do not. Nor does the law invite excessive entanglement into religious affairs because the court is prohibited from inquiring into the truth of any matters alleged in the affidavit. While rare instances of criminal prosecution may implicate establishment concerns, the potential for constitutional infringement is so insignificant that it should have no effect

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350. In any event, these constitutional objections apply only to criminal prosecutions, not to the affidavit requirements. A version of the bill prepared by Agudath Israel contained a severability clause, perhaps to address the concerns expressed in the text. See Lewin File, *supra* note 276. For some unknown reason, however, such a clause was deleted from the enacted legislation. See Lewin File, *supra*. Even in the absence of a severability clause, the impermissibility of state prosecution under the general penal law would presumably *not* taint the *get* legislation.

on the overall validity of the law. As such, section 253 should withstand attacks based on the Establishment Clause.

The foregoing analysis, building on Justice O'Connor's insight,<sup>351</sup> assumes that legislation designed to remove disadvantages suffered by religious adherents does not "advance" religion (in the sense of "endorsement") because it simply equalizes the benefits enjoyed by all—in this case, the ability to remarry following a divorce. As noted earlier, this assumption is not universally shared.<sup>352</sup> Some construe the second prong of *Lemon* as validating religious exemptions or removal of barrier legislation only where the state has imposed the disability or restriction.<sup>353</sup> Under this view, where the disadvantage arises from the religious practice itself, governmental attempts to alleviate it constitute impermissible efforts to advance religion. The inability of Orthodox Jewish women to remarry without a *get* may be a serious disability, but it is one that has nothing to do with any rule of the state. Because it is not a state-imposed burden, the argument goes, it cannot be ameliorated by legislative action.<sup>354</sup>

Even accepting the premises of this approach, which concededly reflect the thinking of at least some justices on the Supreme Court,<sup>355</sup> it still may be argued that section 253 of the New York law is constitutional. It all depends on how one defines the burden. While it is true that the inability of a spouse to remarry without a *get* is not a state-imposed burden, the particular problem the statute addresses—the post-dissolution *agunah*—is. The ability of a recalcitrant spouse to obtain a civil divorce exacerbates and magnifies a problem that already exists under Jewish law. If spouses did not have the ability to obtain civil divorces, then they would be required to give *gittin* to acquire their own freedom. Because the ability to obtain dissolution of a marriage is a right granted by the state and it is the existence of that right that adds to the cost of religious observance, even a narrow reading of the *Lemon* criteria would justify legislative assistance.<sup>356</sup>

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351. See *supra* text accompanying notes 313-314.

352. See *supra* notes 316-317 and accompanying text.

353. See Claire Zerangue, Comment, *Sabbath Observance and the Workplace: Religion Clause Analysis and Title VII's Reasonable Accommodation Rule*, 46 LA. L. REV. 1265, 1274 (1986); Kristen L. Boyles, Note, *Saving Sacred Sites: The 1989 Proposed Amendment to the American Indian Religious Freedom Act*, 76 CORNELL L. REV. 1117, 1145 (1991).

354. See *supra* note 316 and accompanying text.

355. See *id.*

356. Moreover, following a divorce, a woman may have many legal disadvantages in terms of securing credit, filing a joint return, or obtaining economic support. The bur-

3. *The Get Law and Free Exercise*.—Section 253 of the New York law does raise problems from the perspective of free exercise. By conditioning the grant of a civil remedy on the performance of a religious ceremony, the statute arguably infringes the free exercise rights of the otherwise unwilling spouse.

A careful examination of the *get* law, however, demonstrates that the unwilling spouse's free exercise rights are not truly impaired. First, by the statute's terms, a court does not directly order the plaintiff to do anything; it simply conditions obtaining relief on the removal of barriers. Conceptually, noncompliance with religious law imposes no additional burdens, but simply leaves the parties where they were by continuing the status quo. Second, because the statute requires the giving of a *get* only in cases where a marriage was solemnized by a clergyman whose presence was sought by the parties themselves, it is arguable that the acquiescence in the performance of a religious ceremony carries with it an implied understanding that the existence of the marriage and its dissolution will be governed by religious law.<sup>357</sup> Even if this implication cannot rise to the level of an independently enforceable contract,<sup>358</sup> the existence of such tacit consent certainly dilutes the presence of coercion that the First Amendment proscribes.

Even legislation that burdens religious observance may nevertheless withstand scrutiny if it serves a compelling state interest that could not adequately be protected through less restrictive means.<sup>359</sup> Although the facilitation of the wife's free exercise rights would

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dens on a woman who cannot remarry following a civil divorce are or may be considerably greater than the burdens on the woman before the civil divorce is granted. The state law of divorce is thus a contributing factor to the overall burden of religiously observant Jewish women.

357. See *supra* notes 288-290 and accompanying text.

358. See generally *supra* Part II (discussion of the theory of implied contract).

359. *Employment Div. Dep't of Human Resources v. Smith (Smith II)*, 494 U.S. 872 (1990), does not undercut the essential point in the text. Prior to *Smith II*, general legislation that adversely impacted on religious observance would be sustained only if it served a "compelling state interest." *Smith II* seems to have abrogated this requirement, at least in the narrow context of criminal law. The New York *get* law, because of its neutrally worded requirement of removal of "barriers to remarriage," may qualify as a "generally applicable law" within the meaning of *Smith II*. If it does so qualify, it is constitutionally permissible even in the absence of interests that are deemed "compelling." At worst, therefore, the enumeration of such interests may be superfluous. Conversely, if one were to argue that because of its intended focus, the statute is specifically targeted toward directing the performance of a religious act, i.e., the execution of a *get*, the "compelling state interest" standard should nevertheless be available as a validating mechanism. The fact that *Smith II* no longer necessitates this test for generally applicable law should not preclude its utilization to validate statutes that do not directly fall under the rubric of *Smith II*. But see *infra* Subpart V.A.2.

probably not constitute a sufficiently important state interest in and of itself (because it makes no sense to infringe the free exercise rights of *A* in order to enhance the free exercise rights of *B*), there are a number of other vital interests that section 253 serves.<sup>360</sup> These policies may constitute precisely the type of vital state interest that overrides a free exercise claim.<sup>361</sup> If, in addition, the affidavit requirement also has the effect of enhancing the religious liberty of the victimized spouse, this further tips the balance in the statute's favor.<sup>362</sup>

The unwilling spouse's claim that the *get* law violates his free exercise rights is further refuted in the vast majority of cases, where a refusal to give a *get* is not motivated by religious beliefs, but out of spite, or as a means of obtaining valuable concessions.<sup>363</sup> Indeed, it is precisely because the husband knows that a *get* is needed that he is able to use it as a bargaining chip.<sup>364</sup> The withholding of a civil divorce where the failure to give a *get* is not religiously based is certainly not a First Amendment violation.<sup>365</sup> Moreover, even if a plaintiff claims that his refusal to grant a *get* is based on a religious belief, at most he would be entitled to an evidentiary hearing where the veracity of his claim could be examined. While no court may determine the ultimate truth or validity of a religious belief,<sup>366</sup> the

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360. These interests include ensuring the integrity of the state's divorce procedure, facilitating marriage and family life, protecting rights of privacy, and curbing extortion and victimization.

361. See *supra* notes 324-327 and accompanying text.

362. It must be conceded, however, that application of a "compelling state interest" standard to something like the New York *get* law goes beyond Supreme Court precedent. Prior to *Smith II*, the test was used to uphold legislation of general applicability that had a negative impact on religious observance. See *supra* text accompanying notes 315-318. Here, on the other hand, New York has enacted a law that directly requires a *halachic* ceremony to be performed. The giving of a *get* is the very purpose the law is trying to achieve. It is not entirely clear that even the existence of compelling interests would suffice.

363. See *supra* text accompanying notes 19-20.

364. Remember that if a couple were married in a Reform ceremony, the husband may obtain his civil divorce without a section 253 affidavit regardless of any change in religious commitment the wife may have undergone. See *supra* notes 290-291 and accompanying text. By definition, then, the statute deals with persons who invoked a religious system that required a *get* for marital dissolution.

365. As its language suggests, the constitutional privilege of the free exercise clause is limited to belief or conduct that is predicated on religious rather than secular considerations. See *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989). It seems obvious that otherwise-Orthodox individuals who withhold a *get* for financial purposes are not acting out of religious convictions.

366. See, e.g., *United States v. Ballard*, 322 U.S. 78 (1944) (mail fraud conviction of religious cult leaders could not stand unless the government could show not only that

court may certainly conduct an inquiry into whether the alleged "religious" objections are sincerely held, as is routinely done in cases of conscientious objectors to military service.<sup>367</sup> Finally, even if a religious objection could in fact be established, it may well be overridden by the compelling state interests enumerated above.<sup>368</sup>

Once again, the nondevotional nature of the *get* ceremony, and the fact that in the eyes of Jewish law it is nothing more than a legalistic dissolving mechanism, may mean that indirectly compelling its execution is not a significant curtailment of religious liberty. Even Reform Jews who do not require a *get* as a matter of religious law do not regard the granting of a *get* as a violation of religious conscience; indeed, for various reasons they are often encouraged by their Rabbinate to grant *gittin*.<sup>369</sup> At worst, the granting of a *get* is a superfluous, useless act. Thus, if a husband asserts that he no longer believes that a *get* is necessary, he should be required to justify a free exercise claim by showing that it is offensive to his sincerely held religious principles—a showing that would be quite difficult to make.

### C. Halachic Considerations

Any *get* executed under the compulsion of a secular court order is *halachically* invalid.<sup>370</sup> Therefore, enlisting the assistance of the legislature and the judiciary in confronting the *agunah* problem is of no avail unless the resulting *get* is *halachically* acceptable.

Before submission of its draft proposal to the legislature, Agudath Israel circulated the bill among leading Talmudic scholars for their views as to its *halachic* acceptability. While none of them authored a detailed analysis, the unanimous consensus was that section 253 of the New York law posed no *halachic* problems.<sup>371</sup> By the

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the representations were false but also that they were not honestly held; to hold otherwise would essentially be subjecting religious beliefs to heresy trials); *Thomas v. Review Bd.*, 450 U.S. 707 (1981) (state could not deny unemployment compensation to a person who refused to work on Saturday for religious reasons although he was not a member of a church; the sole touchstone for free exercise claims is an honest conviction that such work was forbidden by one's religion).

367. While the guarantees of the free exercise clause preclude judicial inquiry into the ultimate truth or falsity of a religious belief, they do not prevent a court or government agency from ascertaining whether the asserted religious belief is honestly held. *See supra* note 366 and accompanying text.

368. *See supra* notes 321-327 and accompanying text.

369. *See supra* note 5.

370. *See supra* Subpart II.A.4.

371. *See* Letter from Rabbi Moshe Feinstein to Agudath Israel (June 21, 1981); Letter from Rabbi Yaakov Kaminecki to Agudath Israel (1981); Letter from Rabbi Shimon

statute's terms, a court never orders the execution of a *get*, nor is any sanction, punishment, or fine levied on a recalcitrant husband. The only "sanction" is that a failure to grant a *get* precludes the truthful filing of an affidavit and the obtaining of a civil divorce. At least in *halachic* terms, it is well established that, for purposes of *get meusah*, a denial of a benefit—a civil divorce—is not the same as the imposition of a cost.<sup>372</sup> A law that in effect tells the husband, "If you give your wife a *get*, you will get a civil divorce," is identical to his wife stating, "If you give me a *get*, I will give you \$100." Both are also distinguishable from cases where the husband is told that if he does not give a *get*, he will suffer financial loss.<sup>373</sup>

#### IV. TORT LAW THEORIES

##### A. *The Possibility of Recovery in Tort*

Occasionally, it is suggested that women unable to remarry because their husbands refuse to give them a religious divorce may have a remedy under tort law.<sup>374</sup> The most likely basis for potential tort recovery would be the tort of intentional infliction of emotional distress.<sup>375</sup> Traditionally, tort law was concerned with the protection of a fairly narrow range of interests—bodily integrity, security

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Schwab to Agudath Israel (May 5, 1981); Letter from Rabbi Moshe Stern to Agudath Israel (May 5, 1981); Letter from Rabbi J. Roth to Agudath Israel (May 5, 1981); Letter from Rabbi D. Cohen to Agudath Israel (Summer 1981) (copies of letters on file with author).

372. See *supra* Subpart II.A.4.

373. See *supra* Subpart I.D.

374. See Friedell, *supra* note 189, at 532; Redman, *supra* note 187. Judicial acknowledgement of potential tort remedies is sparse. In the one case where a tort remedy was specifically sought, it was denied. *Perl v. Perl*, 512 N.Y.S.2d 372 (N.Y. App. Div. 1987); see *infra* note 388. One unreported decision suggests in dicta that tort recovery may sometimes be available. *Roth v. Roth*, Civil No. 79-192709 (Mich. 6th Jud. Cir. Jan. 23, 1980) ("[A] refusal to give his wife a *get*, knowing she would not be able to remarry without the distress of violating her deep beliefs, constitutes the intentional infliction of emotional harm. Under some circumstances, the law allows damages for such an injury if the defendant's conduct was outrageous.").

375. Within the fertile soil of the common-law system there is the potential for development of additional tort theories as well. Given the fact that marriage is a fundamental right and without a religious divorce a spouse is disabled from exercising that right, the maintenance of barriers to the exercise of a civil liberty may in itself be tortious, irrespective of the magnitude of emotional distress. See *supra* note 325. Alternatively, a court may invoke the occasionally cited theory of *prima facie* tort where any significant harm caused to another imposes liability in the absence of reasonable justification. See *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS*, § 130, at 1010-11 & n.50 (5th ed. 1984). While such theories have been favorably received by European courts, the American judiciary has been less enthusiastic in applying them. See Dan B. Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335, 345-46 (1980).

of property, and protection of reputation.<sup>376</sup> While it was true that if any of those interests were invaded, damages could include compensation for nonpecuniary elements such as shame, embarrassment, or fright—one could, for example, recover damages for emotional distress incident to a battery—nonetheless the common law was slow to recognize that causing emotional distress without personal or property injury could by itself be tortious.<sup>377</sup> Today, however, virtually every state recognizes the existence of such a tort.<sup>378</sup>

As formulated in the *Second Restatement*,<sup>379</sup> the tort of intentional infliction of emotional distress applies when a person “by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another.”<sup>380</sup> The test focuses on both the extremity of the defendant’s conduct and the severity of the emotional impact on the plaintiff. With respect to the defendant’s conduct, the comments indicate somewhat graphically that it must be “so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community.”<sup>381</sup> The comments also indicate that conduct may become outrageous by an abuse of a position of power and control, or through an individual’s special knowledge that a given plaintiff is peculiarly susceptible to being severely distressed, even if such conduct would not elicit this reaction if done to someone else.<sup>382</sup>

With respect to the magnitude of the distress, once again the comments use a picturesque stream of nouns—the distress may be “fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worry,” but must be more than mere “inconvenience, annoyance, regret, vexation, emotional suspense, trivial insults, and hurt feelings.”<sup>383</sup> Reminding us that we still live in a world with many rough edges, the comments note that it would be an intolerable burden on the legal system and a clog on human interaction to allow routine social slights to be legally actionable.<sup>384</sup> Finally, the comments emphasize the necessary elements of “intent”

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376. See KEETON et al., *supra* note 375, § 54, at 359.

377. See *id.* § 54, at 361.

378. See generally *id.* § 54, at 364-65 & nn.57-61; *id.* § 122, at 901-05.

379. See RESTATEMENT (SECOND) OF TORTS, *supra* note 84, § 46.

380. *Id.*

381. *Id.* cmt. d.

382. *Id.* cmts. e & f.

383. *Id.* cmt. j.

384. *Id.* cmt. d.



or "recklessness"; in order to be liable, an individual must either desire to inflict this magnitude of distress or know that such distress is certain or substantially certain to result from his conduct.<sup>385</sup>

It is entirely possible that in some cases of *agunah*, a tort remedy may be appropriate. While the failure to give a *get* is an omission rather than a commission, there is authority that even a failure to act may give rise to tortious liability, at least when there was a pre-existing intimate or confidential relationship that generated special understandings and expectations.<sup>386</sup> The magnitude of emotional distress a woman undergoes will naturally vary from case to case; the feelings of an intensely Orthodox woman who desires to have children and is approaching the end of her childbearing years and held in a state of limbo are obviously more intense and deserving of legal protection than those of a Reform divorcée who wants a *get* "just to be on the safe side." Undoubtedly, in some cases, if not most, the anxiety, pain, and humiliation will be considerable. Moreover, even if the withholding of a *get* would be of no concern to the average married woman, the husband's knowledge of the particular sensitivities and susceptibilities of his former spouse charges him with a duty to be responsive. Finally, the element of "intent" is normally fairly easy to meet; if the husband's motives are spite or malice, the requisite intent is present by definition.

The more difficult case arises where the husband's motives are not malicious per se, but rather are economic. For example, the husband may be using the *get* as a trading chip to obtain concessions, such as reduction in alimony, joint custody, or extra visitation rights. Driving a hard bargain, or even an unconscionable one, is not clearly conduct of such outrageous or extreme character as to "go beyond all possible bounds of decency," and therefore probably should not be regarded as tortious.<sup>387</sup> Indeed, in the one case where this contention was raised it was rejected, albeit on a different ground.<sup>388</sup> Thus, while a tort theory might be available in the cases

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385. *Id.*

386. *See, e.g., United States Auto. Ass'n v. Glens Falls Ins. Co.*, 350 F. Supp. 869, 872 (D. Conn. 1972) (noting that failure of an insurer to settle within policy limits may constitute the intentional infliction of emotional distress).

387. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 84, § 46 cmt. d.

388. *See Perl v. Perl*, 512 N.Y.S.2d 372, 376 (N.Y. App. Div. 1977) (holding that a one-sided inequitable property settlement granted to secure a *get* may be invalidated on the grounds of duress). In *Perl* the court dismissed the wife's claim for damages on the grounds of intentional infliction of emotional distress, applying the somewhat dubious reasoning that the husband's motives were purely economic, and the component of mental distress only a "regrettable by-product." *Id.* Technically, the court is incorrect. As the *Restatement of Torts* notes, intent to inflict emotional distress exists not only when

of spite, it is less clear that it precludes a threatened withholding of the *get* in the context of settlement negotiations, even where the demands being made are inherently unreasonable.<sup>389</sup>

There may be other impediments to this action as well. As a minor point, not all states recognize the tort of intentional infliction of emotional distress, though the overwhelming majority do.<sup>390</sup> Moreover, although interspousal immunities have largely been abolished, at least in the context of intentional torts, a number of states have been reluctant to allow suits between spouses based on emotional distress, fearing this would flood the courts with excessive litigation.<sup>391</sup> One might assume this obstacle could be surmounted by simply deferring the filing of a complaint until after the grant of a civil divorce.<sup>392</sup> Yet case law suggests that courts will refrain from

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an individual desires to inflict harm, but also when he knows that such harm is certain to result from his actions. See RESTATEMENT (SECOND) OF TORTS, *supra* note 84, § 46 cmt. 1. Nevertheless, while the economic context of the refusal does not negate intent, it does diminish the "outrageous" and "extreme" character of the recalcitrance—at least to the extent that it no longer may be regarded as tortious. *Id.*

The impact of *Perl* is not yet clear. On one hand, it may allow women to promise their husbands the world in order to receive their *get*, and afterward have the agreement set aside. (This is probably already the case with child custody agreements, where any prior concession as to custody is reviewable or modifiable under the "best interests of the child" test. See *In re Custody of Neal*, 393 A.2d 1057, 1059-60 (Pa. Super. Ct. 1978).) On the other hand, the ability to apply such a strategy may backfire. It may mean that, notwithstanding concessions, the husband will refuse to act in the absence of a guarantee that the concessions will not be overturned by a court at a later date. As such, *Perl* may aggravate the *agunah* problem rather than diminish it.

389. See also RESTATEMENT (SECOND) OF TORTS, *supra* note 84, § 46 cmt. g (insisting on legal rights is not tortious).

390. See Daniel J. Givelbar, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 43 n.9 (1982) (listing jurisdictions that recognize the tort of intentional infliction of emotional distress).

391. See KEETON et al., *supra* note 375, § 122, at 903; see also, e.g., *Browning v. Browning*, 584 S.W.2d 406, 407-08 (Ky. Ct. App. 1979) (disallowing husband's claim for intentional infliction of emotional harm based on wife openly consorting with another); *Weicker v. Weicker*, 237 N.E.2d 876, 876-77 (N.Y. 1968) (denying relief to ex-wife who claimed that a Mexican divorce was invalid and sued for emotional harm caused by former husband and new wife holding themselves out as validly married); *Haldane v. Bogy*, 25 Cal. Rptr. 392, 392-93 (Cal. Dist. Ct. App. 1962) (denying relief to plaintiff-husband who sued defendant for harboring plaintiff's wife and paying an attorney to file a groundless divorce action); *Hafner v. Hafner*, 343 A.2d 166, 169-70 (N.J. Super. Ct. 1975) (denying recovery to widow who was prevented from seeing her husband during his last illness by husband's son from a previous marriage); *Friedman v. Friedman*, 361 N.Y.S.2d 108, 109-10 (N.Y. App. Div. 1974) (denying recovery of damages by one parent against another for conduct in the course of a child custody battle).

392. Ironically, in New York that would be difficult to do because under the *get* law, N.Y. DOM. REL. LAW § 253 (McKinney 1986), at least where the husband is a plaintiff, there will be no judgment for civil divorce until the *get* is granted. *Id.*

entertaining such suits even where the alleged tortious acts took place after divorce, as long as their genesis lies in the marital relationship.<sup>393</sup>

A close examination of the cases denying recovery shows, however, that all of them involve either the potential for repetitive, harassing litigation, or the presence of a third party interfering in the marriage,<sup>394</sup> making the complaint tantamount to an action based on alienation of affection.<sup>395</sup> Because alienation of affection actions have been abolished, it stands to reason that courts will not allow their resurrection under the guise of "infliction of emotional distress."<sup>396</sup> Neither of these factors is present in an action predicated on failure to give a *get*. These cases do not involve the presence of an officious third party, and they are not actions to restore or compensate for the impairment of a marriage, but to ensure that a marriage that is legally dead no longer poses any marital disabilities. Moreover, the potential for repetitive litigation appears slight because unlike child custody cases, where by definition the feuding parents must remain in frequent contact, the *get* controversy could be resolved by a single act done in less than an hour. The precedents denying recovery for interspousal claims of distress in general do not rule out recovery here.<sup>397</sup>

### B. Purposes Served

In formulating responses to the *agunah* problem, the principal purpose should be to create mechanisms that maximize the chances

393. Thus, for example, in *Friedman*, the court denied recovery for emotional distress incident to a custody battle even though the parties were already divorced. See *Friedman*, 361 N.Y.S.2d at 110.

394. *Friedman* involved a scenario that was likely to repeat itself often, where hard feelings and animosity were to be expected. But see *supra* note 391 (discussing cases involving third parties who were allegedly interfering with a spousal relationship).

395. While the right to bring such an action was originally limited to husbands, virtually all states that allow the action at all currently grant wives the same protections. See RESTATEMENT (SECOND) OF TORTS, *supra* note 84, §§ 683-685; KEETON et al., *supra* note 375, § 124, at 915-31.

396. Because of their great potential for abuse and harassment, these actions have been abolished or at least severely curtailed in the great majority of the states, either by statute or judicial decision. Indeed, in some jurisdictions, bringing such an action is a criminal offense. For a listing of statutes abrogating this tort, see KEETON et al., *supra* note 375, § 124, at 930 n.93. The policies behind these statutes, often called "Heart-Balm Laws," are analyzed in two articles by Nathan Feinsinger. See Nathan P. Feinsinger, *Legislative Attack on "Heart Balm,"* 33 MICH. L. REV. 979 (1935); Nathan P. Feinsinger, *Current Legislation Affecting Breach of Promise to Marry, Alienation of Affections, and Related Actions*, 10 WIS. L. REV. 417 (1935).

397. See *supra* note 391.

that victimized spouses will receive their *gittin*. Because a tort claim generally involves the right to obtain a money judgment, tort law in and of itself does not accomplish this goal. The true value of a common-law remedy is its deterrent effect. Consequently, for a tort remedy to be effective, parties who would otherwise be unwilling to give *gittin* must in effect be forced to do so in order to escape the imposition of civil liability. As a secondary form of inducement, in the event a judgment is obtained, the wife has a bargaining chip of her own—agreeing to release or reduce the debt in exchange for the execution of the *get*. Yet another incentive on the part of the defendant-husband to execute a *get* after being found liable for a judgment is the possibility of being subject to successive lawsuits. Because each withholding of a *get* is arguably a new “act” of harassment, the wife can continue to bring successive actions even after recovering in an earlier suit.<sup>398</sup>

If the principal utility of a tort remedy lies primarily in its deterrent effect, however, its usefulness may be somewhat limited. The uncertain contours of the common-law remedy—its questionable application to interspousal suits, possible difficulties in proving malevolent intent, the uncertain measure of damages, and the high cost of litigation, particularly unreimbursed attorney’s fees—combine to make a significant tort recovery so difficult to obtain that a recalcitrant husband may well be willing to take his chances. In any event, if his wife loses her case, he would be free of any restraint whatsoever.

At least one commentator has suggested legislation specifically providing that the maintenance of a barrier to remarriage subsequent to the grant of a civil divorce, after receiving notice of such barrier from the other spouse, constitutes the intentional infliction of emotional distress.<sup>399</sup> The statute would specify that damages are to be calculated at a specified dollar figure for every day of delay and would provide for the award of attorney’s fees and costs.<sup>400</sup> By eliminating troublesome, difficult-to-prove issues, such as malice and the amount of damages suffered, and by reducing plaintiff’s ultimate costs in pursuing the action, the likelihood of an unwilling

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398. This last proposition may be somewhat debatable in light of the role of *res judicata*, which precludes “splitting” causes of action. See RESTATEMENT (SECOND) OF JUDGMENTS §§ 24-26 (1982); FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE §§ 11.6-11.13, at 536-56 (2d ed. 1977).

399. Letters from Nathan Lewin, Esq., to David Zweibel, Esq., General Counsel of Agudath Israel (July 24, 1985 and Aug. 2, 1985) (on file with author).

400. *Id.*

husband giving in to his wife's demand is greatly enhanced. To date, however, no state has acted on this proposal.

Assuming such a tort remedy could be statutorily codified, providing the necessary certainty and specificity to make it an effective deterrent, it would be superior to the alternative statutory approach of section 253 of the New York law<sup>401</sup> in a number of respects. For example, while the New York law ensures that a plaintiff in a divorce action will not be able to obtain a civil divorce without giving a *get*, it provides no protection to spouses who have already been divorced.<sup>402</sup> The tort remedy specifically addresses this problem. Additionally, the New York law applies only where the plaintiff is the party maintaining the barrier. If, for example, a woman whose husband refuses to give her a *get* is the divorce plaintiff, there is no pressure on the husband to come forward and give a *get*. The tort remedy would allow recovery against the recalcitrant party regardless of the identity of the divorce plaintiff.

Tort recovery would also afford women relief irrespective of the principles under which the original marriage was solemnized. If, for example, the couples were married by Reform clergy, but in the course of the marriage, the woman embraced Orthodoxy and is now unable to marry without a *get*, section 253 of the New York law would not apply, but the tort action would.<sup>403</sup> Finally, one of the constitutional objections to section 253 of the New York law is that it links the power of the state to issue a civil divorce with compliance with a religious ceremony and the officiating clergyman's concurrence. Giving clergy a veto in the exercise of governmental functions arguably excessively entangles the church and state in violation of the Establishment Clause.<sup>404</sup> Whatever the merits of this criticism—and I have argued that there are none—it has no application to tort liability, a theory that is totally independent of the granting of a civil divorce. Indeed, it would not even be triggered until after a civil divorce was granted. Thus, even the states that have been reluctant to enact an analogue of section 253 of the New York law might consider a tort statute as an alternative.

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401. N.Y. DOM. REL. LAW § 253 (McKinney 1986).

402. For example, the proposed legislation would apply to spouses divorced prior to 1983, pursuant to the wife's complaint, or where the wife for some reason waived the husband's affidavit requirement.

403. The draft statute prepared by Nathan Lewin, however, does track the New York statute by limiting tort liability to cases where barriers exist "under the religious or conscientious principles under which the former spouses solemnized their marriage." See Lewin File, *supra* note 276.

404. See *supra* text accompanying note 343.

*C. Constitutional Problems*<sup>405</sup>

As noted, at least with respect to the *Larkin* problem of involving clergy in the exercise of government functions, recognition of a statutory or common law action for damages poses fewer constitutional objections than a procedure that compels the state to delay the entry of a divorce judgment.<sup>406</sup> On the other hand, because the imposition of a monetary sanction might be regarded as substantially more coercive than a mere denial of a benefit, allowing recovery in tort may constitute a greater infringement of religious liberty in the event the husband has a free exercise claim. In any case, however, the possibility of a legitimate free exercise claim is slight and would likely be overcome by a variety of compelling state interests.<sup>407</sup>

With respect to the Establishment Clause, it is difficult to see any particular endorsement, promotion, or advancement of religion where recovery is based on judicial application of tort law by pigeonholing a refusal to give a *get* into the recognized category of intentional infliction of emotional distress. Victims of emotional distress or turmoil arising from their religious beliefs should be entitled to at least the same protection as those whose distress arises out of any other sensitivity, proclivity, or even eccentricity, of which the defendant is aware.<sup>408</sup> In both cases, the court is protecting the free-

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405. This section presupposes the continued validity of the tripartite standard of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). There is a distinct possibility that the test will be replaced. Probable alternatives are discussed *infra* Subpart V.B.

406. See *supra* notes 344-348 and accompanying text.

407. Interestingly, because a common-law theory would afford recovery irrespective of the principles under which the marriage was solemnized, the free exercise problem may be a bit more pronounced because even a committed Reform Jew who never believed in the institution of a *get* could find himself liable in damages for failure to give one. This would not occur under § 253 of the New York law. See N.Y. DOM. REL. LAW § 253 (McKinney 1986). Nevertheless, as noted earlier in connection with the *get* law, affording women relief in these circumstances may be justified by a state's interests. See *supra* notes 324-327 and accompanying text; note 360 and accompanying text. Moreover, a refusal to give a *get* is rarely motivated by religious beliefs—even a Reform Jew has no principled objection against the giving of a *get*; at worst, he would regard it as an unnecessary, superfluous act. See *supra* Subpart III.B.3. Note too, that under Nathan Lewin's version of the statute, tort recovery would be limited to situations where barriers exist because of the principles under which the marriage was solemnized. See Lewin File, *supra* note 276. This limitation further minimizes the possibility that free exercise is being curtailed. See *supra* note 403.

In any event, after *Smith II*, discussed *infra* Part V, the possibility of a free exercise attack is greatly diminished.

408. See RESTATEMENT (SECOND) OF TORTS, *supra* note 84, § 46 cmt. f ("[I]t is more likely that conduct is extreme and outrageous where defendant has knowledge that a plaintiff is peculiarly susceptible to emotional distress.").

dom of the plaintiff from unjustifiable emotional invasion, not upholding or affirming the principles of religion.

If, on the other hand, a state were to enact a special statute focused exclusively on the "barrier to remarriage" problem and specifying a unique and large liquidated damages penalty irrespective of actual injury suffered, the constitutional issue would be less clear. Here, the failure to perform a religious act gives rise to sanctions that might be considerably greater than causing other forms of emotional distress. The state is in effect passing judgment that noncompliance with religious law is a more heinous violation of personal integrity than other forms of invasion. Elevating religious sensibilities to such a preferred position seems to raise establishment problems. While it is true that a tort statute may be worded neutrally (as is section 253 of the New York law), speaking of "religious or conscientious" constraints, any court would quickly see that the purpose of the tort remedy is to protect the rights of Jewish women to receive a *get*. Tort law may well be an appropriate, though cumbersome, vehicle in an *agunah*'s efforts to secure justice, but only a tort law that is even-handed and neutral in its application can do so in a constitutionally permitted way.

In this respect, a "removal of barrier" tort statute seems to pose considerably more problems than New York's *get* statute.<sup>409</sup> Singling out "removal of barriers to remarriage" in the context of a divorce proceeding makes perfect sense. The state has a specialized, unique secular interest in ensuring the efficacy of its divorce laws, and withholding the grant of a divorce until its effectiveness can be guaranteed is a narrowly tailored mechanism that achieves that end. By contrast, the state does not have a specialized, unique secular interest in singling out in its tort law one particular vice that impinges on religious practice to the exclusion of other vices that do not. Thus, while many of the secular purposes that justify the *get* statute apply with equal force to the tort remedy,<sup>410</sup> and while the potential for entanglement is significantly reduced,<sup>411</sup> a specially drafted law whose exclusive purpose is the protection of uniquely religious sensibilities carries with it at least the appearance of the state placing its imprimatur on religion. As such, the constitutionality of such a statute is highly suspect.<sup>412</sup>

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409. As to the *Larkin* problem, see *supra* notes 344-348 and accompanying text, a tort statute would pose less problems.

410. See *supra* note 360-361 and accompanying text.

411. See *supra* notes 337-339 and accompanying text.

412. Technically, the statute fails the second prong of the *Lemon* test as restated by

#### D. Halachic Concerns

A final point to consider is whether recognition of a tort remedy, either by statute or common law, raises *halachic* problems. As repeatedly noted, any *get* executed under compulsion, including the order of a secular court, is invalid unless the compulsion was authorized pursuant to the order of the *bais din*.<sup>413</sup> Such compulsion may be authorized only in specially defined circumstances.<sup>414</sup> According to the authoritative view of Rashba<sup>415</sup> as codified by Rema,<sup>416</sup> invalidating coercion exists not only when there are threats to person or property, but also when the alternative to the *get* would be the imposition of financial penalties.<sup>417</sup> Thus, Rashba rules that any *get* executed pursuant to the husband's prior commitment to either pay or divorce is invalid.<sup>418</sup> Moreover, those who differ with Rashba do so only because the self-imposed nature of the undertaking negates the element of compulsion.<sup>419</sup> Where the imposition of financial constraints is nonconsensual, but arises by operation of secular law, it is possible that all authorities would regard the resulting execution of a *get* as invalid.<sup>420</sup>

It would appear, therefore, that any *get* issued under a potential cloud of civil liability may well constitute a *get meusah*. While it may be that a generalized fear of a possible common-law exposure in a tort suit is too remote and attenuated to rise to the level of actual duress, particularly because the magnitude of the consequences are not spelled out in advance, a statute clearly setting out a husband's liability irrespective of his intent and specifying a named sum to be imposed for each day of delay seems indistinguishable from the penalty clause condemned by Rashba. If anything, the fact that the statutory penalties are not voluntarily self-imposed makes them even worse. This is yet another reason to question the wisdom of a tort statute. Theoretically, a *halachically* valid statute could be crafted providing for damages only in cases where the recalcitrant spouse

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Justice O'Connor (i.e., that the primary effect is the promotion or endorsement of religion). See *supra* notes 313-314, 328-336 and accompanying text.

413. See *supra* text accompanying notes 72-79.

414. See *supra* note 80.

415. 4 RASHBA, *supra* note 75, no. 40; REMA, *supra* note 76, at 124:5.

416. REMA, *supra* note 76, at 124:5.

417. *Id.* Technically, Rema cites both views but rules that such a *get* should not be executed. If, however, it has been, the divorce is valid after the fact.

418. *Id.*

419. See RABBI YOSEF COLON, *supra* note 83, no. 63.

420. This is not entirely clear. Some authorities may take the position that because the penalty is a reasonable alternative, the decision not to pay, but to execute the *get* instead, becomes a matter of choice. See *supra* note 75.



either refuses to appear before a *bais din* or disobeys the decision of a *bais din*. Any statute that clearly tracked the specific requirements of religious doctrine, however, would be even more vulnerable to an Establishment Clause attack and would likely not survive a constitutional challenge.

While the Jewish community does not have control over the development of common-law tort doctrine, it would not be in their interest to lobby for a statute that would make failure to give a *get* an actionable tort. Besides the questionable constitutionality of such an attempt—an issue one could safely leave to the courts—there is the distinct possibility that any resulting *gittin* will be *halachically* invalid. The supposed “solution” would be far worse than the problem that it was supposed to solve.

## V. CURRENT DEVELOPMENTS IN CHURCH-STATE LAW AND THEIR IMPACT ON THE *AGUNAH* PROBLEM

The legitimacy of governmental action that is alleged to constitute an “establishment of religion” has historically been assessed against the tripartite test developed in *Lemon v. Kurtzman*,<sup>421</sup> while infringements on free exercise have been justified only if there is a “compelling governmental interest” that could not be achieved through less burdensome or restrictive means.<sup>422</sup> Under both the establishment and free exercise tests as they have been traditionally formulated, the New York *get* law as well as judicial enforcement of rabbinical arbitration agreements or even specific performance of *get* covenants would appear to pass constitutional muster. Recent court decisions, however, are changing some of the basic and long-standing ground rules in this area.

### A. *The Smith Case and the First Amendment*

1. *The Decision.*—The major recent development in free exercise law was the 1990 decision of the Supreme Court in *Employment Division, Department of Human Resources v. Smith (Smith II)*.<sup>423</sup> *Smith II* involved two drug counsellors who were fired from their jobs for using peyote as part of a Native American religious ritual. It was assumed that they were sincere practitioners of their religious be-

421. 403 U.S. 602 (1971); see discussion *supra* Subpart III.B.1.

422. See *supra* note 318.

423. 494 U.S. 872 (1990). In the author's judgment, these changes will have little impact on the constitutionality of *get* covenants, *Avitzur* agreements, and the New York *get* law. See *supra* Subpart III.B.1.

liefs.<sup>424</sup> They applied for unemployment compensation, which the state denied on the grounds that the use of a controlled substance constituted job-related "misconduct" that barred the collection of compensation. In an earlier case,<sup>425</sup> the Court ruled that the propriety of the denial depended squarely on whether the use of peyote was proscribed under the state's criminal law and, if it was, whether such a proscription constituted an impermissible infringement of free exercise.<sup>426</sup> Because neither question had been addressed by the Oregon Supreme Court,<sup>427</sup> the case was remanded to the state level for necessary findings.<sup>428</sup> In *Smith II*, the Supreme Court held, in a six to three decision,<sup>429</sup> that the state may constitutionally prohibit the use of narcotics even in religious ceremonies. Although the state could have adopted a religious exemption if it desired,<sup>430</sup> such an exemption was not constitutionally necessary. In its absence, the use of peyote constituted proscribable criminal conduct that would justify the lesser sanction of a denial of unemployment benefits.

2. *The Impact of Smith II on Free Exercise Analysis.*—On one level, *Smith II* is not particularly shocking. The notion that parties

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424. 494 U.S. at 872.

425. *Employment Div., Dep't of Human Resources v. Smith (Smith I)*, 485 U.S. 660 (1988).

426. *Id.* at 672-74. Although *Smith I* did not involve a criminal prosecution, the Court reasoned that any conduct that the state has made criminal can be the basis for the lesser sanction of denial of benefits. *See id.* at 673-74. Thus, once it is established that the ingestion of peyote even for religious purposes was proscribed by state law and constitutionally could be, the propriety of denial of benefits would automatically follow.

427. The Oregon Supreme Court, in *Smith v. Employment Div., Dep't of Human Resources*, 721 P.2d 445 (1986), had no reason to address the criminality of sacramental peyote use because it took the position that benefits could not be denied even if the underlying misconduct was criminal as long as it was religiously motivated. *See id.* at 449-50. The Supreme Court disagreed and remanded the case to the state court for a determination of criminality. *See Smith I*, 485 U.S. at 673-74.

428. *See Smith I*, 485 U.S. at 673.

429. The opinion of the Court was written by Justice Scalia and was joined by Chief Justice Rehnquist, and Justices Kennedy, Stevens, and White. Justice O'Connor concurred in the judgment but wrote a separate opinion affirming traditional free exercise analysis. A dissenting opinion was authored by Justice Blackmun and was joined by Justices Brennan and Marshall.

430. The opinion of the Court makes clear that although religious accommodations are not constitutionally required, they are permitted. *See Smith II*, 494 U.S. at 890. Indeed, a number of states do exempt the sacramental use of peyote from their drug laws. *See, e.g.*, N.M. STAT. ANN. § 30-31-6 (Michie 1989); COLO. REV. STAT. § 12-22-317(3) (1985); *see also* *Peyote Way Church v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991) (holding that a religious exemption limited to the members of the Native American Church is not violative of either the establishment clause or equal protection even where other religious groups are not exempted).

may not invoke religious freedom as a shield to criminal prosecution is not new and dates at least as far back as the polygamy cases.<sup>431</sup> What is new and disturbing is the fact that at least five members of the Court took the position that the general, nondiscriminatory scope of the law was in and of itself adequate justification to prosecute religious violators without the need to establish a "compelling state interest" in doing so.<sup>432</sup> The result in *Smith II* could easily have been assimilated into the existing test of *Sherbert v. Verner*.<sup>433</sup> The Court could have held, for example, that the pressing societal need to curtail drug use constitutes a compelling state interest of a far greater magnitude than the need for a uniform day of rest recognized in *Braunfeld v. Brown*.<sup>434</sup> Moreover, the potential for fraud and abuse necessitates that the curtailment be absolute if less restrictive means are insufficient to accomplish this goal. The Court's pointed refusal to predicate its holding on the existence of a compelling state interest—which it could easily have done—augurs poorly for the cause of religious freedom.

Outside of the realm of noninterference with belief and affirmation, apparently very little survives of the Free Exercise Clause and the constitutional recognition of religion as a fundamental right. Justice Scalia, writing for the Court, indicated that the government may not constitutionally compel affirmation of belief, punish or penalize the expression of religious doctrine it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority and dogma.<sup>435</sup> Nor can a state prohibit a given act *only* when it is performed for a religious reason.<sup>436</sup> Nevertheless, the "right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability [merely] on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"<sup>437</sup> The Court further noted that "to make an individual's obligation to

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431. See, e.g., *Reynolds v. United States*, 98 U.S. 145 (1879) (upholding the enforcement of antipolygamy statutes against Mormons).

432. *Smith II*, 494 U.S. at 884-86. Justice O'Connor, who concurred in the judgment, did not agree with this analysis. See *id.* at 897-903.

433. 374 U.S. 398 (1963).

434. 366 U.S. 599 (1961).

435. See *Smith II*, 494 U.S. at 877.

436. "It would doubtless be unconstitutional, for example, to ban the casting of 'statues that are to be used for worship purposes' or to prohibit bowing down before a golden calf." *Id.* at 877-78.

437. *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs 'to become a law unto himself'—contradicts both constitutional tradition and common sense."<sup>438</sup>

*Smith II* radically alters the nature of "free exercise" analysis and, for those concerned for the preservation of religious liberty, not necessarily for the better.<sup>439</sup> It is widely regarded as sounding the "death knell" for free exercise claims against generally applicable laws or regulations,<sup>440</sup> and this is probably an accurate assessment. Yet before the Free Exercise Clause is buried, it is important to note a number of qualifications and limitations in the Court's analysis.

First, while six justices of the Court concurred in the judgment, only five rested their decision on the abandonment of the "compelling state interest" standard.<sup>441</sup> Justice O'Connor, who concurred with the ruling, did so exclusively on the "compelling state interest" theory rather than relying solely on the law's nondiscriminatory application.<sup>442</sup> The existence of such a five to four split on the Court indicates that the matter is far from settled, and the *Sherbert* test could conceivably be resurrected.<sup>443</sup>

The Court further appeared to concede that to the extent a religious infringement also affects communicative and associational rights under the First Amendment, strict scrutiny under the "compelling state interest" standard will continue to be appropriate.<sup>444</sup> Many religious liberty claims can be reformulated into claims based on state infringement of rights of association, parenting, or the

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438. *Id.* at 885 (citation omitted).

439. Indeed, serious concerns in the aftermath of *Smith II* have prompted the introduction of federal legislation specifically designed to overturn it. See H.R. 2797, 102d Cong., 1st Sess. (1991).

440. See, e.g., Aron Raskas, *The Court's Smith Decision Threatens Religious Freedom*, DAILY REC., June 5, 1991, at 13; Ruth Marcus, *Reins on Religious Freedom? Board Coalition Protests Impact of High Court Ruling*, WASH. POST, Mar. 9, 1991, at A-1 (quoting various views).

441. These include Justice Scalia, who wrote the opinion, Chief Justice Rehnquist, and Justices Kennedy, Stevens, and White.

442. *Smith II*, 494 U.S. at 891, 903-07 (O'Connor, J., concurring).

443. Justices Brennan and Marshall were replaced respectively by Justices Souter and Thomas. Their views on the scope of free exercise are unknown, yet there is little reason to believe they would be advocates for overruling *Smith II*. It must be noted, however, that of the four justices who would have retained the "compelling state interest" standard (Justices Blackmun, Brennan, Marshall, and O'Connor), two (Brennan and Marshall) are no longer on the Court, while all five of the justices who joined in the Scalia opinion (Justices Kennedy, Rehnquist, Scalia, Stevens, and White) still are.

444. See *Smith II*, 494 U.S. at 881-82.

like.<sup>445</sup> For example, one of the common fears expressed in the wake of *Smith II* is that parents could be prosecuted for allowing minors to partake of wine during the *Shabbat* meals or at the Pass-over *seder*.<sup>446</sup> Yet could not any Jewish parent raise the argument that the failure to accommodate religious observance not only impacts on free exercise rights of religion, but also on the rights of parents to direct the upbringing of their children by training them in the precepts of their faith? Indeed, a similar associational argument could have been raised in *Smith II* itself. It remains to be seen whether "religion plus" arguments will be sympathetically received by the courts or whether they will be regarded as transparent attempts to circumvent *Smith II*; it is at least possible, however, to make the argument.

Moreover, the opinion is not clear whether the strict scrutiny necessitated by the "compelling state interest" test is totally discarded (at least in "pure" religion cases) or whether it may still survive in contexts outside of criminal prosecution. There is language in the opinion that suggests that *Smith II* is limited to a denial of religious exemption for *criminal misconduct*.<sup>447</sup> Where the religious practice in question is not criminal, but simply results in a denial of governmental benefits, the *Smith II* opinion appears to indicate that it may still be the law that religious exemptions must be granted unless the "compelling state interest" test is met.<sup>448</sup> This conclusion, however, is not inescapable. In distinguishing *Sherbert* from the facts in *Smith II*, the Court might simply have limited the scope of earlier inconsistent precedent without necessarily suggesting that such precedent, even as narrowly defined, should still be regarded as binding law.<sup>449</sup>

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445. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (invalidating compulsory school attendance laws as applied to Amish parents who refused on religious grounds to send their children to school); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that parents have a constitutional right to educate their children outside of the public schools).

446. See Raskas, *supra* note 440.

447. See *Smith II*, 494 U.S. at 884 ("Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law."); *id.* ("Whether or not the decisions are that limited, they at least have nothing to do with an across-the-board criminal prohibition on a particular form of conduct."); *id.* at 885 ("The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.' " (citation omitted)).

448. *Smith II*, 494 U.S. at 883-84.

449. Indeed, all lower courts that have construed and applied *Smith* have refused to

B. *The Future of the Lemon Test Under the Establishment Clause*

*Smith II* involved the validation of a statute that was challenged under the Free Exercise Clause as an infringement of religious freedom. It has no direct impact on *Lemon*'s tripartite analysis under the Establishment Clause.<sup>450</sup> Indeed, the lower federal courts have continued to apply *Lemon* in cases decided after *Smith II*.<sup>451</sup> The close mirror-image relationship between the clauses, however, inevitably suggests that changes on one side of the religion equation have some repercussions on the other. Indeed, there are strong indications from the Court that the *Lemon* test may undergo a complete overhaul or at least a radical redefinition in the direction of less scrutiny of establishment claims. A harbinger of such an imminent change was the 1989 decision of *County of Allegheny v. ACLU*,<sup>452</sup> a complex, interlocking array of concurrences and dissents, which indicated that at least four justices of the Court are willing to do to the Establishment Clause what five justices of the Court did to the free exercise guarantees in *Smith II*. *Allegheny* involved the constitutionality of two recurring holiday displays located on public property in downtown Pittsburgh: a crèche (nativity scene) placed inside of a courthouse and a Christmas tree-menorah combination just outside the City-County Building together with a sign saluting religious liberty. The Court of Appeals for the Third Circuit, applying the *Lemon* test, ruled that both displays violated the Establishment Clause because their "primary effect" was the advancement of reli-

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limit the case to criminal prosecution and have upheld a variety of noncriminal laws that negatively impact on religious observance and that do not afford any religious accommodation or exemption. See *Munn v. Algee*, 924 F.2d 568 (5th Cir.), *cert. denied*, 112 S. Ct. 277 (1991); *Vandiver v. Hardin County Bd. of Educ.*, 925 F.2d 927 (6th Cir. 1991); *Intercommunity Center for Justice & Peace v. INS*, 910 F.2d 42 (2d Cir. 1990); *Salvation Army v. Department of Community Affairs*, 919 F.2d 813 (3d Cir. 1990). See also the disheartening cases of *Yang v. Sturner*, 750 F. Supp. 558 (D. R.I. 1990), and *Montgomery v. County of Clinton*, 743 F. Supp. 1253 (W.D. Mich. 1990), *aff'd*, 940 F.2d 661 (6th Cir. 1991), both of which held that a state statute requiring autopsies for victims of violent deaths need not provide a religious exemption for those people whose religious beliefs prohibit desecration of the dead.

450. See *supra* Subpart III.B.1.

451. See *Cammack v. Waihee*, 932 F.2d 765 (9th Cir.), *petition for cert. filed*, 60 U.S.L.W. 3406 (U.S. Nov. 12, 1991) (No. 91-796); *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir.), *petition for cert. filed*, 60 U.S.L.W. 3153 (U.S. Aug. 19, 1991) (No. 91-299); *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir.), *petition for cert. filed*, 60 U.S.L.W. 3654 (U.S. Mar. 15, 1991) (No. 91-1448); *Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991), all of which applied the tripartite test of *Lemon* to alleged Establishment Clause violations without suggesting that *Smith II* changed the test in any way.

452. 492 U.S. 573 (1989).

gion.<sup>453</sup> The Supreme Court affirmed in part and reversed in part, ruling that the crèche was unconstitutional, but the *menorah*-Christmas tree combination could be allowed to stand.<sup>454</sup> Ironically, however, the judgment of the Court was fully supported by only two justices. Four justices would have upheld both displays;<sup>455</sup> three justices would have prohibited both displays.<sup>456</sup> Only Justices Blackmun and O'Connor actually took the position that there was a constitutionally significant distinction between the crèche and the *menorah*-Christmas tree; they themselves were in disagreement over the reasons why.<sup>457</sup> Thus, although seven out of nine justices believed the Court's decision was erroneous, the crèche was struck down by a vote of five to four,<sup>458</sup> and the *menorah*-Christmas tree display was sustained by a vote of six to three.<sup>459</sup> Because the actual holding of the Court reflects no one's view of the Establishment Clause other than those of Justices Blackmun and O'Connor, looking at the Court's holding might be less important than focusing on the particular approaches to establishment law that each of the justices advocated in his or her concurrence or dissent.

A careful analysis of the opinions reveals that five justices are willing to retain the tripartite test of *Lemon*, or at least that part of the test that focuses on "effects."<sup>460</sup> In determining whether a governmental practice has the "primary effect" of advancing religion, these justices strongly support the view, expressed by Justice O'Connor in a number of concurrences, that the touchstone of the inquiry is not merely whether religion is benefitted, but whether it is "endorsed," "promoted," or "favored."<sup>461</sup> Specifically, the ques-

453. See *ACLU v. County of Allegheny*, 842 F.2d 655 (1987), *aff'd in part, rev'd in part*, 492 U.S. 573 (1989). As is commonly the case, the court of appeals had no need to consider purpose or entanglement because, in its judgment, the displays failed the "primary effect" criterion.

454. See *Allegheny*, 492 U.S. at 621.

455. See *id.* at 655-79.

456. See *id.* at 637 (opinion of Justice Brennan); *id.* at 646 (opinion of Justice Stevens).

457. Compare *id.* at 613-21 (Blackmun's analysis) with *id.* at 632-37 (O'Connor's approach).

458. The five were Justices Blackmun and O'Connor together with Brennan, Marshall, and Stevens.

459. The six were Justices Blackmun and O'Connor together with Kennedy, Rehnquist, Scalia, and White.

460. Justice O'Connor herself, who clearly advocates the "endorsement" test in applying the "effects" prong, has openly questioned the wisdom of the "excessive entanglement" criterion. See *Aguilar v. Felton*, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting).

461. See *Allegheny*, 492 U.S. at 592-94 (citing Justice O'Connor's concurring opinions in *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) and *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984)).

tion in every instance is whether the challenged practice “ ‘sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.’ ”<sup>462</sup> Whether a given display has this effect depends on a consideration of its overall placement and context and how “viewers would fairly understand [its] purpose.”<sup>463</sup>

It appears that Justices Brennan, Marshall, and Stevens conceded the basic formulation of this standard, and simply disagreed as to its application to the specific facts of the case.<sup>464</sup> These justices maintained that the state’s imprimatur exists whether Jewish and Christian symbols are combined or whether only Christian ones are shown. In either case, the nonbeliever is essentially excluded.<sup>465</sup> Justice Blackmun argued, on the other hand, that both the *menorah* and the Christmas tree have become largely secular symbols of historical and seasonal impact and carry no such religious significance.<sup>466</sup> Justice O’Connor, agreeing with Justice Blackmun’s result, preferred not to ignore the religious nature of the symbols employed (at least in the case of the *menorah*) but, in the overall context of the display, believed the message of pluralism and liberty was dominant.<sup>467</sup> In principle, therefore, there does not appear to be a significant disagreement within this group of five, although Black-

462. *Id.* at 595 (quoting *Lynch*, 465 U.S. at 690 (O’Connor, J., concurring)).

463. *Id.* (quoting *Lynch*, 465 U.S. at 692 (O’Connor, J., concurring)).

464. The opinion is a bit confusing on this score. Although five justices joined in Part III-A of Blackmun’s opinion that affirmed both the *Lemon* test and the focus on “promotion” and “endorsement,” Part III-B, which contains the quoted language from *Lynch* regarding the message conveyed to adherents and nonadherents and the need to focus on context, was joined only by Justice Stevens. Nevertheless, the basic underlying concept that the vice of establishment is the message that it conveys regarding an adherent’s standing in the political community seems to be accepted by Justices Brennan and Marshall as well. See, e.g., *Lynch*, 465 U.S. at 694 (Brennan, J., dissenting). Indeed, the quoted language from Part III-B of the *Allegheny* opinion is merely an amplification of that which was implicit in Part III-A of the opinion. Presumably, Justices Brennan and Marshall refused to join Part III-B of the opinion because, first, it relies on *Lynch v. Donnelly*, a crèche case with which Brennan and Marshall disagreed and second, it suggests distinctions based on context and proximity to other symbols, distinctions that Brennan and Marshall were not prepared to make.

465. See *Allegheny*, 492 U.S. at 637-46 (Brennan, J., concurring in part and dissenting in part); *id.* at 646-55 (Stevens, J., concurring in part and dissenting in part).

466. *Id.* at 613-21. Justice Brennan criticizes this argument by asserting that, rather than the tree redefining the significance of the *menorah*, it may be just as likely that the *menorah* redefines the nature of the tree. *Id.* at 641 (Brennan, J., dissenting).

467. *Id.* at 632-37. O’Connor specifically disclaimed any reliance on the lack of a more secular alternative. Here too, Brennan made a trenchant observation in noting that a celebration of religious pluralism that appropriates Jewish and Christian symbols hardly conveys a “neutral” message. He noted that the dictates of the Establishment



mun and O'Connor were more willing to make finer contextual distinctions than were Brennan, Marshall, and Stevens.<sup>468</sup>

The second group, however, represents a sharp break with past *Lemon* analysis. Justice Kennedy, joined by Justices Rehnquist, Scalia, and White, began his opinion with an open invitation to reconsider and revamp the *Lemon* test:

In keeping with the usual fashion of recent years, the majority applies the *Lemon* test to judge the constitutionality of the holiday displays here in question. I am content for present purposes to remain within the *Lemon* framework but do not wish to be seen as advocating, let alone adopting, that test as our primary guide in this difficult area. Persuasive criticism of *Lemon* has emerged. . . . Substantial revision of our Establishment Clause doctrine may be in order.<sup>469</sup>

Ultimately, however, this group does apply *Lemon* but—with heavy reliance on the historical sanction given to practices such as prayers at the opening of legislative and judicial proceedings and references to God in coinage<sup>470</sup>—they would replace O'Connor's "promotion" test with one that would focus on elements of "coercion," "intimidation," or "proselytization," and would therefore permit state recognition of the religious symbols adopted by its citizenry.<sup>471</sup> Civic acknowledgement of the role religion plays in the lives of its citizens

Clause not only mandate neutrality among religions but between religion and nonreligion. *Id.* at 644 (Brennan, J., dissenting).

468. Indeed, Brennan criticizes Blackmun's preoccupation with the relative size or placement of symbols as being more appropriate to "an exam in Art 101" than to constitutional analysis. *Id.* at 643.

469. *Id.* at 655-56 (Kennedy, J., concurring in part and dissenting in part). It should be noted that even prior to *Allegheny*, a number of the justices who joined Kennedy had already expressed in no uncertain terms their belief that *Lemon* should be discarded. See *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, C.J., dissenting); *Roemer v. Board of Pub. Works*, 426 U.S. 736, 768 (1976) (White, J., concurring).

470. Justice Kennedy's concurrence relies heavily on *Marsh v. Chambers*, 463 U.S. 783 (1983), which sustained the practice of opening legislative sessions with prayer and on the presence of long-standing practices such as the proclamation of a National Day of Prayer, 36 U.S.C. § 169h (1988); a religious reference in the Pledge of Allegiance, 36 U.S.C. § 172 (1988); the national motto of "In God We Trust," 36 U.S.C. § 186 (1988); and the use of that motto on all currency, 31 U.S.C. § 5112(d)(1) (1988). Conceding that historical patterns alone cannot "justify contemporary violations of constitutional guarantees," *Allegheny*, 492 U.S. at 670, Justice Kennedy posited that historically sanctioned patterns and traditions are probative in ascertaining the intended meaning of those guarantees, and any interpretation of the clause that would prohibit such long-standing traditions "cannot be a proper reading." *Id.*

471. See *Allegheny*, 492 U.S. at 659-60, 664-65.

should be regarded as a "reasonable accommodation" to the feelings and sensibilities of its populace rather than an "impermissible establishment."<sup>472</sup>

Notwithstanding the heated rhetoric in the Court's denunciation of the Kennedy reformulation,<sup>473</sup> the differences between the two tests should not be exaggerated. On a practical level, there may not be that much of a distinction between the "endorsement" test under *Lemon* and the "coercion" test advocated by the four-judge plurality. Indeed, there is a substantial overlap. Even the advocates of a "coercion" test recognize that coercion may take subtle forms and may be indirect as well as direct.<sup>474</sup> For example, it is unlikely that any justice would permit daily school prayer in an elementary school classroom on the grounds that any fifth-grader who elects not to participate could leave the room.<sup>475</sup> Justice Kennedy himself notes that a municipally sponsored year-round display of a prominent cross could very well have an intimidating effect on non-Christians, although no one would be openly demanding adherence to the tenets of Christianity.<sup>476</sup> Thus, even under the Kennedy analysis, many cases of "promotion," "endorsement," or "favoritism" will involve at least the less blatant forms of "coercion"; governmental activities that make nonadherents feel like outsiders may correspondingly generate "proselytization" pressures.<sup>477</sup> Justice Blackmun, in spite of his vigorous attacks on the Kennedy formula-

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472. *Id.* at 679 (Kennedy, J., dissenting).

In my view, the principles of the Establishment Clause and our Nation's historic traditions of diversity and pluralism allow communities to make reasonable judgments respecting the accommodation or acknowledgement of holidays with both cultural and religious aspects. No constitutional violation occurs when they do so by displaying a symbol of the holiday's religious origins.

*Id.* (Kennedy, J., dissenting).

473. *See id.* at 609 n.57, 611.

474. *See id.* at 660-62 (Kennedy, J., concurring in part and dissenting in part).

475. Indeed, Kennedy specifically cites with approval *Engel v. Vitale*, 370 U.S. 421 (1962), the case that invalidated prayer in the classroom, as an example of indirect coercion. *See Allegheny*, 492 U.S. at 661 n.1 (Kennedy, J., concurring in part and dissenting in part).

476. I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall. This is not because government speech about religion is *per se* suspect, as the majority would have it, but because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion.

*Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in part and dissenting in part).

477. *See supra* text accompanying note 461 (discussing derivation of "endorsement," "promotion," and "favoritism," and the importance of the message conveyed to outsiders).

tion, essentially conceded this point by noting that, if faithfully applied, the Kennedy test should yield many of the same results as *Lemon*.<sup>478</sup>

Suffice it to say, however, that the four justices who propounded the Kennedy test are clearly of the mind that official recognition of religion in rites of passage or at holiday times is to be sharply distinguished from the type of permanent intrusion that has longer lasting psychological effects. Issues such as duration, timing, vulnerability of the audience, alternatives available to the audience, the ease in exercising those alternatives—factors that are immaterial under a pure “promotion” test—become highly relevant in assessing the coercive impact of the governmental action under a “proselytization” standard.

In short, while Blackmun’s test focused on the nature of the government’s actions—how a disinterested observer would interpret what the government was doing—Kennedy’s test would focus on the *effect* of those actions on the audience exposed to them. Interestingly, Kennedy’s analysis has the effect of collapsing the Establishment Clause into the Free Exercise Clause. Under Kennedy’s formulation, the two clauses essentially coalesce into a single focus of concern directed to the protection of individuals from governmental actions that have the effect, directly or indirectly, of interfering with religious belief. Actions that have no such effects will be permitted under this standard even if they otherwise involve the state in public acknowledgement of the religious beliefs and rituals of its citizenry.

Given the reality that these differing standards will indeed yield different results in at least some cases, it is not clear what test the Court will adopt. While headcounting is always a risky predictor, it is significant that two of the five justices (Brennan and Marshall) who would retain *Lemon* scrutiny are no longer on the Court, while all four of the justices who would either abandon *Lemon* or emasculate it still are. The positions of Justices Souter and Thomas are unknown and their votes will be critical. The Court’s granting of certiorari in *Lee v. Weisman*,<sup>479</sup> a case involving the permissibility of

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478. *Allegheny*, 492 U.S. at 608, 609 n.57 (arguing that a crèche display should be banned even under a proselytization standard). But cf. *id.* at 602 (Kennedy’s arguments are “far reaching in their implications.”); *id.* at 604 (“Justice Kennedy’s reading of *Marsh* would gut the core of the Establishment Clause, as this Court understands it.”); *id.* at 609 (A “proselytization” test “seems nothing more than an attempt to lower considerably the level of scrutiny in Establishment Clause cases.”).

479. 908 F.2d 1090 (1st Cir. 1990), cert. granted, 111 S. Ct. 1305 (1991). In *Weisman v. Lee*, the court of appeals affirmed the decision of the district court to enjoin a nonsec-

nonsectarian prayer at a junior high school graduation ceremony, indicates that it is prepared to reconsider *Lemon*. Indeed, the United States as *amicus* specifically urged the Court to replace *Lemon* with a less exacting standard, based on Justice Kennedy's *Allegheny* opinion, a standard that would permit civic acknowledgement of religion in public life as long as the activity does not create an official religion or coerce participation in religious activities.<sup>480</sup> The oral arguments in *Lee* were presented November 6, 1991, and a decision is expected shortly.<sup>481</sup>

In sum, the development of establishment law jurisprudence will follow one of three paths: establishment cases will continue to be analyzed under *Lemon*, will be judged by a substitute standard that would validate legislation regardless of its "primary effect" as long as its "purpose" is secular, or will be judged by an even more liberal standard that would allow legislation or legal practices to stand as long as there are no elements of coercion, intimidation, or

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tarian prayer. See 908 F.2d at 1090. The district court had applied the tripartite test of *Lemon* in a fairly straightforward manner to conclude that the state's sponsorship of a prayer at a public school graduation places its stamp of approval on religion and therefore has the impermissible effect of an endorsement or promotion. See *id.* The Supreme Court's grant of certiorari indicates movement away from *Lemon* and suggests that Justice Kennedy's invitation has been accepted.

480. See Brief for the United States as Amicus Curiae, Petition for certiorari filed in *Lee v. Weisman*, No. 90-1014 (U.S. Feb. 22, 1991). The United States conceded that coercion may take subtle and indirect forms, but submitted that some consideration must be given to an individual's free choice not to view or be present at a civic acknowledgement of religion with which he does not agree. *Id.* at 32. The government also made the telling point that the combination of *Lemon* and *Marsh* breeds a two-tiered standard of review that leads to wildly inconsistent results. Under *Marsh*, the Court appears to reject the *Lemon* test in favor of a blanket validation of historical practices specifically validated by the Framers, e.g., legislative prayers, while *Lemon* will invalidate those very same practices if occurring in contexts that were nonexistent at the time of the Framers, e.g., prayers at high school graduations. *Id.* at 29.

It should be noted that not all justices view *Marsh* as a blanket validation of historical practice and that it can in fact be harmonized with the *Lemon* test. See *Allegheny*, 492 U.S. at 595-96 n.46 (Blackmun, J.); *Lynch v. Donnelly*, 465 U.S. 668, 693 (O'Connor, J., concurring).

481. There are also a number of major establishment cases for which petitions for certiorari have been filed, but the Supreme Court has not yet agreed to review. All of them may pose the occasion for the reexamination of *Lemon*. To the extent *Lee v. Weisman* effects a change in the *Lemon* doctrine, these cases are likely to be remanded for reconsideration. See *Doe v. Village of Crestwood*, 917 F.2d 1476 (7th Cir. 1990) (banning the municipal sponsorship of a Catholic Mass as part of an Italian-American festival); *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990) (upholding the banning of the Bible from a fifth grade classroom); *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991) (upholding a state statute that designates Good Friday as a legal holiday); *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3153 (U.S. Aug. 19, 1991) (No. 91-299) (upholding the use of Christian symbols as part of a municipal seal).

the like. Under any of these alternatives, the Court's direction will be either to curtail Establishment Clause claims or keep the *status quo*.

C. *The Impact of Smith II and Allegheny on the Constitutionality of the Get Law and Avitzur*

Here, the conclusions appear to be simple and straightforward. To the extent the *get* law can be sustained against free exercise attacks based on the compelling secular state interests that it serves,<sup>482</sup> the law can certainly survive the less exacting scrutiny in effect after *Smith II*. This result follows for one of two reasons. First, because the New York *get* law is phrased in terms of an obligation to remove "barriers to remarriage," rather than deliver a *get*, it is in itself a law of general applicability that, under *Smith II*, need no longer be justified by reference to a "compelling state interest." Second, even if the *get* law is viewed as specifically targeted to the problem of the Jewish *agunah* (which is indeed its primary purpose) and thus, would not be directly protected under the *Smith II* analysis, the "compelling state interests" that it serves, as well as the fairly attenuated "free exercise" claims that can be raised in opposition,<sup>483</sup> should continue to immunize the law from constitutional attack. While *Smith II* may have removed the "compelling state interest" test as a basis for evaluating general law, it should not be read to preclude the use of such a test to validate laws that do not fit the *Smith II* rubric. After all, *Smith II*'s abandonment of *Sherbert* was designed to curtail free exercise claims, not expand them.

By the same token, to the extent the *get* law furthers legitimate state interests of a secular nature and does not endorse or advance the cause of religion, but simply levels the playing field by removing a disability that is peculiar to a particular religious class, the statute passes muster not only under *Lemon* but under any probable alternative test that the Supreme Court is likely to adopt. The same is true for *get* covenants and *Avitzur*-type agreements.<sup>484</sup> If these contrac-

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482. See *supra* Subpart III.B.3.

483. See *supra* notes 363-368 and accompanying text.

484. Indeed, it is arguable that the application of Kennedy's proselytization test would even validate a "removal of barrier" tort statute. While such a statute may well constitute a "promotion" or "endorsement" of religion, it is difficult to see how a narrowly tailored legislative initiative, applicable in a relatively small number of cases, induces any type of psychologically coercive effect on the citizenry to adhere to the tenets of Judaism. It is a close case, however, for although a "removal of barrier" tort statute may not constitute "proselytization" for Judaism as a whole, it does directly coerce a recalcitrant spouse to comply with a Jewish ceremony or ritual. Thus, the same objections that I

tual arrangements were sustainable prior to *Smith II* and *Allegheny*, they are even more justifiable afterwards. Thus, as frightening as *Smith*, *Allegheny*, and the imminent decision of *Lee* may be for the advocates of religious liberty, they pose little threat to the particular religious problems addressed in this Article.

### CONCLUSION

This Article has endeavored to trace the various legal avenues that Jewish women unable to obtain *gittin* by conventional means might be able to pursue. Jewish women have always had access to the *bais din* system in securing a court order directing their husbands to give them a *get* and, under certain circumstances, this order could be enforced by imprisonment, fines, or corporal punishment. Wholly apart from the *halachic* problems, however, this approach accomplishes little or nothing in societies like the United States where rabbinical courts possess no coercive powers. The *halachic* power of a *bais din* to incarcerate a husband for his failure to grant a *get* has no meaning under a system where a *bais din* has no power to imprison at all. In a sense, the *agunah* crisis does not stem from any limitations internal to the *halachic* system itself, but from the interaction of that system with the non-*halachic* societal structure within which it attempts to operate.

On the secular side of the coin, there is ample case law authority that would enforce agreements through an order of specific performance to give a *get* or to submit to the jurisdiction of a rabbinic tribunal. Even those parties without the foresight to enter into explicit prenuptial agreements may be able to invoke the terms of the traditional *ketubah* to accomplish the same thing. In the absence of a contract, aggrieved parties may be able to invoke theories of tort law, though to date that response has not proven very successful.

Whether any of these legal solutions are truly adequate depends on an intricate analysis of *halacha* to ensure that a resulting *get* is not invalid by reason of its being coerced. The divergent opinions among *halachic* schools, the lack of any apparent forum through which *halachic* authorities could provide comprehensive, consistent input to the secular judiciary, and the constitutional limitations of the Establishment Clause all demonstrate that courts are ill-equipped to engage in this type of comprehensive analysis. In its absence, however, reliance on contract or tort law alone could be

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raised earlier under the O'Connor test, *see supra* Subpart III.C, could indeed continue to apply even under the Kennedy formulation.

fatal to the *halachic* validity of the *get*. Extreme caution must be employed to ensure that judicial solicitude for victimized wives does not engender a "cure" worse than the "illness." Finally, technical devices such as prenuptial support agreements seem to present the fewest *halachic* dilemmas and offer significant and widespread potential for relief, at least for those parties who have the foresight to utilize them. Rabbis should encourage their congregants to employ these expedients, and hopefully, they will come into common use.